In The

SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. 47

LINCOLN FEDERAL LABOR UNION #19129, AMERICAN FEDERATION OF LABOR, NEBRASKA STATE FEDERATION OF LABOR, ET AL., APPELLANTS,

V.

NORTHWESTERN IRON AND METAL COMPANY, DAN GIEBELHOUSE, STATE OF NEBRASKA, AND NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEBRASKA.

BRIEF OF APPELLEES, STATE OF NEBRASKA AND NEBRASKA SMALL BUSINESS MEN'S ASSOCIATION.

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OPINION OF COURT BELOW.

The opinion of the Supreme Court of Nebraska in this case (R. 53) is reported at 149 Neb. 507, 31 N. W. (2d) 477.

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED.

The appellants have invoked the jurisdiction of this court under Section 237 (a) of the Judicial Code as amended, 28 U. S. C. A. 344 (a), this being a case where there is drawn in question the validity of a statute (constitutional amendment) of a state on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity.

Although counsel for appellees considered filing a statement against jurisdiction on the ground that the contentions of appellants are so unsubstantial that they do not merit consideration by this court, they decided not to file such a statement against jurisdiction because this court had accepted jurisdiction in the similar case of *Whitaker, et al.* v. *North Carolina*, notwithstanding the statement against jurisdiction filed by the Attorney General of North Carolina. On May 24, 1948, this court noted probable jurisdiction (R. 86).

STATUTE INVOLVED.

The Nebraska Right-to-Work Amendment became effective December 12, 1946, and is incorporated in the Nebraska Constitution as Sections 13, 14 and 15 of Article XV. It reads as follows:

"Section 1.

"No person shall be denied employment because of membership in or affiliation with, or resignation or expulsion from a labor organization or because of refusal to join or affiliate with a labor organization; nor shall any individual or corporation or association of any kind enter into any contract, written or oral, to exclude persons from employment because of membership in or non-membership in a labor organization.

"Section 2.

"The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"Section 3.

"This article is self-executing and shall supersede all provisions in conflict therewith; legislation may be enacted to facilitate its operation but no law shall limit or restrict the provisions hereof."

STATEMENT OF THE CASE.

On February 19, 1947, the plaintiffs (appellants), Lincoln Federal Labor Union No. 19129, American Federation of Labor, Nebraska State Federation of Labor, and Henry Reichel, individually and as president of said Lincoln Federal Labor Union No. 19129, filed their petition (R. 1) in the District Court of Lancaster County, Nebraska, against the defendants, Northwestern Iron and Metal Company, a Corporation, Dan Giebelhouse, and State of Nebraska. Over the objections of defend-

ants Northwestern Iron and Metal Company and Dan Giebelhouse, the Nebraska Small Business Men's Association was permitted to intervene as a defendant (R. 39, 38). The defendants are appellees here.

The petition alleges (R. 9) that the defendant Northwestern Iron and Metal Company and the plaintiff Lincoln Federal Labor Union entered into a collective bargaining contract, paragraph 3 of which provides in part as follows (R. 9, 33):

> "Whenever any employee shall cease to be a member in good standing with the Union and when the Union shall have given written notice to the Company to that effect, the Company agrees to discharge said employee from its service at the end of the work week in which said notice of failure to maintain good standing in the Union is received.";

that the defendant Dan Giebelhouse became delinquent in the payment of his dues and was suspended and ceased to be a member in good standing in the union; that (R. 10) the union gave the employer the required notice to discharge Giebelhouse but the employer refused to do so and repudiated Section 3 of its contract and asserted that it was illegal and void under the provisions of the Nebraska Right-to-Work Amendment referred to as the Anti-Closed-Shop Amendment, which was adopted by vote of the people of Nebraska on November 5, 1946, and became effective December 12, 1946 (R. 16). The provisions of the amendment are set up in the petition (R. 15).

The petition alleges (R. 16) that the amendment is void because in conflict with the Constitution of the United States.

The petition prays (R. 20) for a declaratory judgment that the collective bargaining agreement including paragraph 3 is valid and enforcible; that the Right-to-Work Amendment is unconstitutional and void; that the Northwestern Iron and Metal Company be ordered to perform the contract and to discharge Dan Giebelhouse, and be enjoined from continuing him in its employ.

The State of Nebraska filed a demurrer to the petition (R. 40), and the other defendants filed motions for judgment on the pleadings (R. 40,41), which, on July 7, 1947, the district court sustained, and entered its declaratory judgment (R. 44) holding that the Right-to-Work Amendment (now designated as Sections 13, 14 and 15 of Article XV of the Constitution of the State of Nebraska) is in all respects valid; that the union shop provisions of the collective bargaining agreement had been void and unenforcible since December 12, 1947; that Northwestern's refusal to discharge Giebelhouse was lawful and proper, and compliance with the union's demands for discharge would have been unlawful. The court further found that the terms of the amendment were no broader than necessary to carry out its objective, that the particular phase of employer-employee relations covered by said amendment has a definite relationship to the public welfare, and is subject to the police power of the state; that said amendment is not unreasonable, arbitrary or capricious; that the means selected have a real and substantial relation to the object sought to be attained by said amendment.

From this declaratory judgment and the order overruling the motion for new trial (R. 49) the plaintiffs appealed to the Supreme Court of Nebraska, which

affirmed the judgment on March 19, 1948 (R. 52), and filed a carefully considered opinion (R. 53-78), concluding that (R. 78) "the amendment is a reasonable, proper, and valid exercise of the police power of the state. As such, it is not in conflict with or repugnant to any federal law, but integrated therewith, and does not violate any provision of the Constitution of the United States, but on the contrary guarantees all those rights to all persons whomsoever within this state, whether employers or employees, union members or non-union members."

From this judgment the plaintiffs have appealed to this court.

SUMMARY OF ARGUMENT.

The Nebraska Right-to-Work Amendment makes it unlawful to deny employment to any person because of his membership or non-membership in a labor organization.

Since appellants' attacks upon the Right-to-Work Amendment resolve themselves largely to a contention that it is not a lawful exercise of the police power of the state, we shall first consider the police power, and the functions of the legislative and judicial branches of the government in connection with its exercise. Then, in the light of facts judicially known to the courts, we shall discuss the objects of the Right-to-Work Amendment, and the relation of the legislation to the objects sought to be obtained. With that background, and after discussing the nature and effect of motions for judgment on the pleadings and demurrers, from the sustaining of which this appeal was taken, we shall examine the allegations

of plaintiffs' petition and discuss separately appellants' assignments of error.

The police power is the power of the state to promote order, safety, health, morals and the general welfare. Employment contracts are subject to regulation by the police power. An act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation. With the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. Due process demands only that the law shall not be unreasonable, arbitrary, or capricious and that the means selected shall have a real and substantial relation to the objects sought to be attained. The function of the court is "only to determine whether it is possible to say that the legislative decision is without rational basis."

The primary object sought to be attained by right-to-work legislation is the guaranty to the individual human being that his right to work for a living in the common occupations of the community, which this Court has said is of the essence of personal freedom, is protected from both labor union leaders and employers who might attempt to deprive him of that right, either because he is or is not a member of a labor union. Objects secondary to the protection of this personal freedom are:

(1) Elimination of strikes caused to force employers into compulsory union membership contracts.

(2) Equalizing bargaining power between employers and employees' bargaining agents and thus

checking the tendency toward featherbedding, union encroachment on management functions, etc.

(3) Promotion of business efficiency.

(4) Protection of employers against being arbitrarily put out of business by use by union leaders of compulsory membership contracts and secondary boycotts.

(5) Protection of employers from being forced into monopolies and combinations in restraint of trade by union leaders using the weapons of compulsory union membership and secondary boycotts.

(6) Protection of the democratic processes in the unions themselves against the tendency to dictatorial leadership fostered by compulsory membership contracts which deter criticism of and opposition to existing leadership by threat of expulsion from the union with resulting loss of the right to work.

(7) Protection of individual workers, unions, employers and the public from the results of strikes, monopolies, featherbedding, racketeering and abuses and injustices fostered by compulsory union membership contracts.

That these are legitimate objects is evident without discussion. Their accomplishment would promote order, safety, health, morals and general welfare.

That the legislation has a real and substantial relation to the objects sought to be attained appears equally evident. Although the court will not judge of the adequacy or practicability of the law to forward its objects, it seems clear that the Right-to-Work Amendment will very defi-

nitely tend to accomplish its objects. It cannot be said that the legislative decision is without rational basis.

We turn to the appellants' petition to see by what allegations they seek to sustain the burden of showing that the Right-to-Work Amendment has no substantial relation to the objects sought to be attained.

Since the decree was entered pursuant to a demurrer and motions for judgment on the pleadings, the facts well pleaded in the petition will be considered as admitted, but not conclusions, inferences, opinions, predictions, arguments or allegations contrary to facts of which judicial notice is taken, or which are contrary to law. The twenty page petition of appellants contains no facts supporting their contentions of unconstitutionality. It is largely unsupported conclusions, opinions, predictions and arguments, and these are contrary to those which logically follow from the facts of which courts take judicial notice.

The substance of the petition is appellants' contention that compulsory union membership contracts are the only method unions have of obtaining an adequate share of the joint product of capital and labor, their conclusion that outlawing such contracts imperils the very existence of labor organizations, and their prediction that the right-to-work legislation will finish the unions as effective collective bargaining agencies. No facts alleged support such conclusions and predictions and they are contrary to facts which courts judicially notice, such as the existence and increase in strength of the powerful railway labor unions under a federal law that outlaws compulsory union membership contracts for railway labor.

Appellants' four assignments of error may be summarized as contentions that the Right-to-Work Amendment is invalid (1) because it deprives them, without due process of law, of liberty to make compulsory union membership contracts with employers, (2) because it impairs the obligations of such contracts which were in existence when the amendment became effective, (3) because, they say, it gives non-union workers protection and therefore deprives the unions and their members of the equal protection of the law, and (4) because the amendment prevents the unions from adequately functioning and thereby deprives them of their constitutional right of free speech and peaceable assembly.

We take these up in reverse order and begin by discussing free speech and assembly. In the first place, the Right-to-Work Amendment does not disable unions from adequately functioning. Even where the union is not entitled to exclusive bargaining rights under the federal law because the business involved does not affect interstate commerce, a rare case and not the case at bar, compulsory union membership is not indispensable to unions. Secondly, even if the Right-to-Work Amendment would render unions ineffective to accomplish their avowed purposes, it would still not be repugnant to the First Amendment, for it is absurd to contend that the rights of free speech or peaceable assembly carry with them a guarantee that the speech or assembly shall be successful in accomplishing its objectives. The protection of the First Amendment does not even extend to speech when the speech becomes coercive. *A fortiori*, no right to coerce men into union membership could possibly be added to the right of free speech or assembly as a concomitant thereof.

The third assignment of error—the claim that the unions are denied the equal protection of the laws—may have more semblance of merit when applied to right-to-work legislation from some state other than Nebraska, for the Nebraska amendment is as much anti-yellow dog as it is anti-closed shop. It protects both the union and the non-union man from denial of employment because of membership or non-membership in a labor organization.

The second assignment of error, contending that the right-to-work legislation impairs the obligation of contracts, is disposed of by what has been said about the police power, and by the well established rule that "every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power."

In their first assignment of error appellants contend that the court erred in failing to hold that the Right-to-Work Amendment deprived the unions of liberty without due process, particularly in failing to hold that prohibition of compulsory union membership contracts is arbitrary, unreasonable, excessive and without rational basis. Under this assignment of error, appellants argue that there should be regulation to stop the evils the Right-to-Work Amendment is designed to correct, but there should not be complete prohibition of compulsory union membership. They argue with tongue in cheek, for when regulation is imposed, they are as vehement in denouncing it and as vigorous in fighting it as they are in opposing the right-to-work legislation. The state may prohibit if deemed necessary for the promotion of the general welfare. Actually, every regulation involves some pro-

hibition. This is a regulation of collective bargaining and of unions and of employers by prohibiting a noxious incident of labor-management relations. The people of Nebraska decided that this simple, easily understood regulation was preferable to voting the establishment of a system of supervising union initiation fees, dues, assessments, work permits, membership requirements, grounds for expulsion, and collective bargaining demands. Regulation of all of these matters, and the tendency to state control of labor unions which such regulations would entail are made unnecessary by the Right-to-Work Amendment. It gives freedom to the individual worker, and also allows the union to remain free from state control and master its own internal affairs.

ARGUMENT.

I.

THE POLICE POWER.

A. Definition.

In *Home Building & Loan Association* v. *Blaisdell*, 290 U. S. 398, 78 L. Ed. 413, 54 S. Ct. 231, 88 A. L. R. 1481, the court said:

> "The police power is an exercise of the sovereign right of the government to protect the lives, health, morals comfort and general welfare of the people."

The court below, in its opinion, adopted a substantially identical definition of the police power from 16 C. J. S. Constitutional Law, Section 174, page 537, as follows:

> "Police power is the exercise of the sovereign right of a government to promote order, safety, health, morals, and the general welfare of society."

In The Supreme Court in United States History by Charles Warren, (Revised Edition, Little, Brown & Company 1935) Vol. 2 at page 744, it is said:

> "When, in the last decade of the nineteenth century, it [the United States Supreme Court] took the radical step of expanding the old classic phrase defining the objects of the exercise of the police power—'public health, safety and morals'—by interpolating the words 'public welfare', it advanced far towards acceptance of the theory of modern sociological jurists that the law must recognize the priority of social interests."

B. Employment Contracts and Labor-Management Relations Are Subject to the Police Power.

In the opinion of the court below (R. 67 ff) are quotations from a number of decisions of this court supporting the above proposition. We deem it unnecessary to repeat them here.

We would like, however, to quote from *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 81 L. Ed. 703, 57 S. Ct. 578, 108 A. L. R. 1330 (1937), the following:

> "This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day (Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 S. Ct. 383); in requiring redemption in cash of store orders or other evidences of indebtedness issued in the payment of wages (Knoxville Iron Co. v. Harbison, 183 U. S. 13, 46 L. Ed. 55, 22 S. Ct. 1); in forbidding the payment

of seamen's wages in advance (Patterson v. The Eudora, 190 U. S. 169, 47 L. Ed. 1002, 23 S. Ct. 321); in making it unlawful to contract to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of the coal as originally produced in the mine (McLean v. Arkansas, 211 U. S. 539, 53 L. Ed. 315, 29 S. Ct. 206); in prohibiting contracts limiting liability for injuries to employees (Chicago, B. & Q. R. Co. v. McGuire, 219 U. S. 549, 55 L. Ed. 328, 31 S. Ct. 259, supra); in limiting hours of work of employees in manufacturing establishments (Bunting v. Oregon, 243 U. S. 426, 61 L. Ed. 830, 37 S. Ct. 435, Ann. Cas. 1918A, 1043); and in maintaining workmen's compensation laws (New York C. R. Co. v. White, 243 U. S. 188, 61 L. Ed. 667, 37 S. Ct. 247, L. R. A. 1917D, 1; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. Ed. 685, 37 S. Ct. 260, 13 N. C. C. A. 927; Ann. Cas. 1917D, 642). In dealing with the relation of employer and employed, the legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. Chicago, B. & Q. R. Co. v. McGuire, supra (219 U. S. p. 570, 55 L. Ed. 339, 31 S. Ct. 259)."

The Federal Fair Labor Standards Act, 29 U. S. C. A., Sections 201-219, was enacted in 1938 limiting the liberty of employees and employers to contract with reference to wages and hours, and its validity with reference to the due process clause was sustained on the authority of the Parrish case, in *U. S.* v. *Darby*, 312 U. S. 100, 657, 85 L. Ed. 609, 61 S. Ct. 451, 132 A. L. R. 1430.

The National Labor Relations Act, which outlawed the yellow dog contract and would have outlawed the closed shop, except for a proviso, was enacted in 1935. Its constitutionality was sustained in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352 (1937).

The provision of the National Labor Relations Act that it "shall be an unfair labor practice for an employer * * * by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," was upheld in *Phelps Dodge Corporation* v. *National Labor Relations Board*, 333 U. S. 177, 61 S. Ct. 845, 85 L. Ed. 1271, 133 A. L. R. 1217 (1941). The court there said:

> "The course of decisions in this Court since Adair v. United States, 208 U. S. 161, 52 L. Ed. 436, 28 S. Ct. 277, 13 Ann. Cas. 764, and Coppage v. Kansas, 236 U. S. 1, 59 L. Ed. 441, 35 S. Ct. 240, L. R. A. 1915C 960, have completely sapped those cases of their authority."

So the field of contracts of employment is clearly subject to the police power of the state.

As to regulation of labor unions in general, this court said in *Thomas* v. *Collins*, 323 U. S. 516, 532, 65 S. Ct. 315, 89 L. Ed. 430:

> "That the State has power to regulate labor unions with a view to protecting the public interest is * * * hardly to be doubted. They cannot claim special immunity from regulation."

We feel it unnecessary to multiply citations to the same effect.

C. Legislation is Presumed to be in the Public Interest.

In *Erie Railroad Company* v. *Williams*, 233 U. S. 685, 58 L. Ed. 1155 (1914), where this court sustained New York legislation requiring railroads to pay their employees semi-monthly rather than monthly, it is stated in the opinion:

> "Each act of legislation has the support of the presumption that it is an exercise in the interest of the public. The burden is on him who attacks the legislation, and it is not sustained by declaring a liberty of contract. It can only be sustained by demonstrating that it conflicts with some constitutional restraint, or that the public welfare is not subserved by the legislation. The legislature is, in the first instance, the judge of what is necessary for the public welfare, and a judicial review of its judgment is limited. The earnest conflict of serious opinion does not suffice to bring it within the range of judicial cognizance."

D. The Function of the Court.

1. The Function of the Court is Only to Determine Whether It Is Possible To Say That the Legislative Decision is Without Rational Basis.

We quote again from *West Coast Hotel Company* v. *Parrish*, 300 U. S. 379, 81 L. Ed. 703, 57 S. Ct. 578, 108 A. L. R. 1330 (1937):

> "In O'Gorman & Young v. Hartford F. Ins. Co., 282 U. S. 251, 75 L. Ed. 324, 51 S. Ct. 130, 72 A. L. R. 1163, which upheld an act regulating the commissions of insurance agents, we pointed to the presumption of the constitutionality of a statute dealing with a subject within the scope of the police power and to the absence of any factual foundation

of record for deciding that the limits of power had been transcended. In Nebbia v. New York, 291 U. S. 502, 78 L. Ed. 940, 54 S. Ct. 505, 89 A. L. R. 1469, dealing with the New York statute providing for minimum prices for milk, the general subject of the regulation of the use of private property and of the making of private contracts received an exhaustive examination and we again declared that if such laws 'have a reasonable relation to a proper legislative purpose and are neither arbitrary nor discriminatory, the requirements of due process are satisfied'; that 'with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal'; that 'times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power."

In *Clark v. Paul Gray, Inc., et al.*, 306 U. S. 583, 83 L. Ed. 1001 (1939), in which this court held valid a California statute putting a license tax of $7.50 per car on bringing automobiles into the state in caravans for resale, it is stated in the opinion:

"The determination of the legislature is presumed to be supported by facts known to it unless facts judicially known or proved preclude that possibility. * * * it is not the province of a court to hear and examine evidence for the purpose of deciding again a question which the legislature has already decided. Its function is only to determine whether it is possible to say that the legislative decision is without rational basis. * * * The legislature must be assumed to have acted on information available to courts, and

> where * * * the evidence * * * shows that it is at least a debatable question * * * decision is for the legislature and not the courts."

2. Factual Study—Judicial Notice.

The parties to this litigation are agreed that in determining the question of whether it is possible to say that the legislative decision is without rational basis—that the object of the legislation is demonstrably not in the interest of the public or that the legislation has no reasonable relation to its object—the court may take judicial notice of the facts and circumstances bearing upon the question. In the appellants' brief reference is made to the brief of Louis D. Brandeis, filed in *Muller* v. *Oregon*, 208 U. S. 412, to a number of law review articles on the subject, and to the dissenting opinions of Justice Brandeis in a number of cases. In one of these, *Truax* v. *Corrigan*, 257 U. S. 312, at 356, he said:

> "Whether a law enacted in the exercise of the police power is justly subject to the charge of being unreasonable or arbitrary, can ordinarily be determined only by a consideration of the contemporary conditions, social, industrial and political, of the community to be affected thereby. Resort to such facts is necessary, among other things, in order to appreciate the evils sought to be remedied and the possible effects of the remedy proposed. Nearly all legislation involves a weighing of public needs as against private desires; and likewise a weighing of relative social values."

In *N. L. R. B.* v. *Jones and Laughlin Steel Corp.*, 301 U. S. 1, 81 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352 (1937), the court took judicial notice of certain matters

in connection with a labor problem attempted to be solved by legislation, the constitutionality of which was questioned before it, and the court referred for such judicial notice to opinions of courts and to reports of governmental commissions and bureaus and congressional committees. In view of what appears to be the now well established practice of this court, and the practice of both appellants and appellees in this case, we take no further space to discuss this matter. Appellants present their separate so-called economic brief. We include the facts and law citations under one cover.

II.

OBJECTS OF THE RIGHT-TO-WORK AMENDMENT AND ITS TENDENCY TO ACCOMPLISH THEM.

A. The Primary Object—The Primary Object Sought To Be Attained by the Right-to-Work Legislation is the Guarantee to the Individual Human Being That His Right to Work For His Living in the Common Occupations of the Community, Which This Court Has Said is of the Essense of Personal Freedom, is Protected From Both Labor Union Leaders and Employers Who Might Attempt to Deprive Him of That Right, Either Because He Is Or Is Not A Member of A Labor Union.

Is this "right to work" something which may be protected? In *Truax* v. *Raich*, 239 U. S. 33, 60 L. Ed. 131 (1915), this court held void an Arizona statute requiring employers of five or more persons to employ eighty percent United States citizens. The court held that the law denied equal protection to aliens, and was not justified as a proper exercise of the police power. The court said:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure."

In *Meyer* v. *Nebraska*, 262 U. S. 390, at 399, 67 L. Ed. 1042, at 1045, this court said:

> "The problem for our determination is whether the statute, as construed and applied, unreasonably infringes the liberty guaranteed to the plaintiff in error by the 14th Amendment. 'No state * * * shall deprive any person of life, liberty or property without due process of law.'
>
> "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, * * *." (Citing many cases.)

Strangely enough, the court which said the state could not take away the right to work, is now asked to say that the state cannot protect the right to work.

Does the "right to work" need protection?

> "For the last 14 years, as a result of labor laws ill-conceived and disastrously executed, the American working man has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in section 1 of the National Labor Relations Act. His whole economic life has been subject to the complete domination and control of unregulated monopolists. He has

on many occasions had to pay them tribute to get a job. He has been forced into labor organizations against his will. At other times when he has desired to join a particular labor organization he has been prevented from doing so and forced to join another one. He has been compelled to contribute to causes and candidates for public office to which he was opposed. He has been prohibited from expressing his own mind on public issues. He has been denied any voice in arranging the terms of his own employment. He has frequently against his will been called out on strikes which have resulted in wage losses representing years of his savings. In many cases his economic life has been ruled by Communists and other subversive influences. In short, his mind, his soul, and his very life have been subject to a tyranny more despotic than one could think possible in a free country."

The foregoing is no mere contention of ours. It is the finding made April 11, 1947, by the House of Representatives Committee on Education and Labor, in reporting out the Labor-Management Relations Act of 1947. Obviously, the situation there reported was due largely to the despotic power obtained by union leaders through compulsory union membership contracts which made the working man's right to work depend on his obtaining and maintaining membership in good standing in a certain labor union, which contracts in large part were imposed upon workers and management with the help of one-sided labor legislation and the necessity of appeasing the labor bosses to obtain production during the recent war years.

This was the situation which existed on November 5, 1946, when the people of the State of Nebraska by a sub-

stantial majority adopted the Right-to-Work or so-called Anti-Closed Shop Amendment to the State Constitution which outlaws such compulsory union membership contracts. Many other states did likewise by statute or constitutional amendment, and on June 23, 1947, the United States Congress passed, over the president's veto, the Labor-Management Relations Act of 1947, which in Section 8 (A) (III) outlaws compulsory union membership agreements, except that if a majority of his employees favor such a contract, an employer may agree with a union (which has met all of the requirements of the law by filing financial statements, etc.) that he will discharge a worker who, after 30 days employment, is not in good standing with the union because of failure to tender periodic dues or initiation fees uniformly imposed.

ADMISSIONS TO AND EXPULSIONS FROM UNIONS.

As a matter of elaborating upon the above quoted findings of the Congressional Committee, let us consider the matter of admissions to and expulsions from labor unions. With reference to this matter, we refer the court to the following excerpt from the book, "American Labor Unions," by Florence Peterson, Director Industrial Relations Division, Bureau of Labor Statistics, U. S. Department of Labor, Harper & Brothers, 1945. This book is written by a government official, very sympathetic with unions, and is made up from official sources. It is pointed out that the constitutions of a number of unions have provisions under which a member may be expelled who openly voices dissatisfaction, or who seeks to solicit votes for a change in union program or officers. We quote the following from page 103:

> "While expulsion for causes other than non-payment of dues is infrequent, it nevertheless is a seri-

ous matter and may prove a hardship in individual cases. This is especially true where unions have closed or union-shop agreements with most or all employers in the industry or locality, in which case expulsion from the union is tantamount to depriving a member of employment within his trade.

"Unions naturally consider those actions by individuals or groups which jeopardize the existence or prestige of the union to be the most serious offenses, such as instigating internal factional disruption, promoting or aiding a rival union, or going to court about internal union matters.

"Although some union constitutions do not specify particular causes for expulsion, all of them carefully outline the procedure to be used when charges are brought against a member. In many constitutions the grounds for expulsion are described in such general terms as 'violation of union rules' or 'continued offense against the union.'

"In contrast are the provisions in a number of constitutions which itemize numerous causes for expulsion which, if enforced, might result in the expulsion of a member who openly voiced dissatisfaction or who sought to solicit votes for a change in union program or officers. Such potential infringements on members' freedom of speech generally turn on such clauses as 'making untruthful statements,' 'impugning the motives of officers,' 'misrepresenting the union and its officers.' The distinction between allowable and forbidden activities in connection with members' efforts to bring about changes in union government and program hinges on what constitutes 'attempts to create dissension among members,' 'advocating or attempting to bring about a withdrawal of any member or group of members,' 'working in

the interests of any cause which is detrimental to the union,' 'hampering any local or National officer.'"

"The constitution of the International Brotherhood of Electrical Workers (AFL) includes the following among the offenses for which members may be fined or expelled: advocating or attempting to bring about a withdrawal of any local union or any member or group of members; sending letters or statements, anonymous or otherwise, or making oral statements to public officials or others which contain untruths about or which misrepresent the union, its officers or representatives; creating or attempting to create dissatisfaction or dissension among any of the members; working in the interest of any organization or cause which is detrimental to or opposed to the union; mailing, handing out or posting cards, handbills, letters, marked ballots or political literature of any kind, or being a party in any way to such being done in an effort to induce members to vote for or against any candidate or candidates for office in a local union, or candidates to conventions. (Article XXVII)"

* * *

"In most cases a member who is expelled from one local may not be admitted by another without the approval of the first local, and some unions also require the approval of the International Executive Board. A few unions put a time limit of six months or a year before any expelled member may rejoin; in all cases, of course, the expelled member must pay all outstanding fines as well as the usual, or sometimes a higher, rejoining fee."

The case of Cecil B. DeMille is well known. Here it is in his own words from the statement he delivered before the House of Representatives Committee on Education and Labor on February 21, 1947:

"I am a member of the Screen Directors Guild. I am a member of the American Federation of Radio Artists (known as AFRA). I have been a member of AFRA since it was organized. Under AFRA's union shop contract with the radio industry, every radio artist is obliged to join the union in order to work at his profession. In 1944, my local AFRA levied upon all its members an assessment of one

dollar, to finance a campaign against a proposition appearing on the California ballot at the general election of that year. I personally favored the proposition. I refused to pay a dollar to oppose my own convictions as a citizen. For this adherence to my political right, I was suspended by AFRA—and, under the provision of the union shop, prevented from appearing on the radio program which I had produced for more than eight years.

"My union, the American Federation of Radio Artists, is an example of a labor monopoly. It has an industry-wide contract, under which no one can work as a radio artist unless he joins AFRA and keeps in good standing with the union. I cannot work as a radio artist anywhere in the United States where AFRA's contract is in force because I refused to pay a political assessment. When a man's right to work depends upon his submitting to such an imposition, the union's monopolistic power is too apparent to require further proof."

Mr. DeMille had many more worth-while comments on compulsory unionism. We quote again from his statement:

"There is no right more fundamental than the right of the human being to work. It is by work that men live.

* * *

"Wherever the closed shop prevails, if a union member is expelled or suspended by his union, he loses his right to work in that shop. In an industry-wide closed shop, he loses his right to work in that industry. In a completely unionized society, under a universal closed shop, expulsion from a union would mean complete and absolute loss of the right to work. The leader of the current Hollywood strike was not exaggerating when he said, 'We contemplate

putting out a bill so everybody in the county has to join a union, and you will be in a bad fix when it comes to that.' (Deposition of Herbert Sorrell, taken by Wesley Cupp, attorney, quoted by Mr. Cupp over radio station KFAC, Los Angeles, March 25, 1945.)

"Millions of Americans are in that 'bad fix' right now—wherever a closed shop contract renders their right to work dependent on keeping in the good graces of a union, which often means a union boss.

"A closed shop union, able to deprive a man of the right to work, is in a sense more powerful than government itself. The government does not claim the power to take away a man's right to work, unless he has been convicted of crime, after fair trial and due process of law. When the government puts a man in prison, it assumes the responsibility for keeping him alive, at least, with food and medical care—as well as shelter! A closed shop union takes no such responsibility for a member who has incurred its displeasure. As far as the union is concerned, he is left with the right to starve."

Mr. DeMille proceeded to point out that there were a number of rights of the individual guaranteed to him by the Constitution of the United States from government interference that the union leaders could override because of their power to take away the individual's right to work.

One of these is the right to religious freedom. On this point Mr. DeMille said:

"No freedom is more precious to us than religious freedom—but I have seen a copy of a letter from a union officer to an official of a church, some of whose members had refused to join the union because, they said, it was contrary to their religious beliefs. The

union officer wrote: "If we are compelled to enforce agreements and one of your people should take this stand, there is nothing else that we could do but insist on its enforcement!"—which means that a man could not work if his religion forbids him to join a union. I am not at liberty to cite the names involved in this correspondence. Neither do I wish to discuss the tenets of any religious denomination. I quote only that one sentence from the union officer's letter to show that at least one union is prepared to override religious freedom in order to compel men to join the union—and the closed shop gives the union the power to carry out its threat."

In his testimony before the United States Senate Committee on Labor and Public Welfare, February 5, 1947, C. E. Wilson, president of General Motors, discussed the maintenance of membership provision which it was forced by the War Labor Board to incorporate in its agreement with the union. He said:

"Under the 'maintenance of membership' provision employees represented by the union for the purpose of collective bargaining could be discharged at the union's request if they failed to maintain their membership in good standing. A number of examples could be given. The following statements from employees who were being discharged under this provision will be of interest:

" 'Of course I will not go up to the hall on meeting nights. The one reason I di' n't pay February. I believe in buying an office for doing the business of a group of men who have a difference of mind between union and company. I believe in bargaining agencies to the extent of right, but I don't believe in buying a place where there's a bar. Now that this where there is a bar and beer and card table and I do not believe in helping buy them. You have taken some

of my money since I belonged and maybe some of my money has gone into that, maybe $12 will go into that. Any den of iniquity where there is beer and whisky sold I don't want to be in. I used to be a drinker and I played some cards, but now I live in the Gospel of Jesus Christ. As far as your business part is concerned, I believe that differences between the company and the union should be thrashed out, like the church that has seven members—they thrash out how much to give the janitor and other things like that. I believe in that because the Bible tells you how to thrash out those things. That is all right, that is what I believe in the Word of God.'

"Another example:

"'I am a minister of the Gospel and I preach against beer, whisky, dancing, card playing and gambling. Therefore, I can't support the union. I don't belong to any lodges because of that, so that is my standing. You can do just as you please. I have already settled it in my own heart. As far as they are concerned they can do just as they please, but I will not pay no more into the union. I am not mad at anybody, but I cannot support an organization like that.'"

A second important freedom is freedom of speech. On this, in the above cited statement, Mr. DeMille said:

"Congress is forbidden by the same Amendment to abridge 'the freedom of speech * * * or the right of the people peaceably to assemble.' But in some unions no member dares to speak out or to combine with his fellow-members against the entrenched power of the union boss or so-called union majority. It would make this brief far from brief if I attempted to list all the cases of infringement of speech by closed shop unions that have come to my attention.

I will cite only one case, mentioned by the Senator from Minnesota, Mr. Ball, in a recent article: 'A wireless telegrapher with a family to support was expelled from a union and lost his job merely because he spoke up in meeting against Communist Leadership.'" (Liberty, Jan. 18, 1947, p. 54.)

But we will not stop with Mr. DeMille. We will cite a few more illustrative cases.

"An illuminating case in point is provided by the United Mine Workers, whose leader John L. Lewis has graciously given the country a 3½ month reprieve from 'the hysteria and frenzy of an economic crisis,' as he himself termed it. During that latest crisis the dispatches from the soft coal fields reported that the miners were standing behind John L. Lewis almost to a man. And the implication usually was that the driving forces of the strike were loyalty to Lewis and the prospect of economic gain.

"Underlying that performance, however, and basic to it was an agreement in the soft coal fields providing that 'as a condition of employment all employees shall be members of the United Mine Workers.' Hence, to hold a job in 90% of the soft coal industry which is governed by contracts with the United Mine Workers, a miner must not offend the union. To avoid offense the union member must even be careful in criticizing what his union does. Suspension from the union for six months and hence from the right to hold a job is the penalty imposed by the United Mine Workers' constitution for circulating a statement 'wrongfully condemning any decision rendered by any officer of the organization.'

"The Closed Shop—Key to Labor Monopoly"—
N. Y. Herald Tribune, Jan. 7, 1947.

"According to its official publication, it (The United Mine Workers with a closed shop contract)

disciplined in one year 4,031 members by expelling them for a total of 150,171 years and by fining them a total of $387,205—an average expulsion period of 35 years per man and an average fine of over $95 per man. Now what becomes of those 4,031 outcasts during these thirty-five years of treatment as commercial lepers?"

Walter Gordon Merritt on America's Town Meeting of the Air, March 23, 1942.

"Two men—let's call them Smith and Black—dropped into the Department of Justice the other day. They had been members of a union in Chicago. Dissatisfied with the management, they had made a protest. The management took away their union cards. This was a catastrophe because the union's old age benefit fund made a membership worth about $5,000. Smith and Black went into court and got an injunction. The union fought the injunction, and during the ensuing litigation Smith and Black went broke. So they gave up their retirement funds and moved to Washington, where, being good workmen, they soon got jobs. As soon as they were established, the Chicago union found out about it and told the Washington employer to fire them. He had to comply.

"Smith and Black are about 50 years old. They are skilled in their trade. But they can't work at that trade any longer. They are stunned and beaten men. It doesn't take many such examples to prove to the workman that he had better not protest too much against the actions of union management."

Thurman Arnold in "Labor's Hidden Holdup Men," Readers Digest, June, 1941.

"At General Machinery Corporation in Hamilton, Ohio, an employee saw another employee strike a foreman on duty and knock him to the floor. The

employee who was the witness testified in the Municipal Court of Hamilton, Ohio, in an assault and battery proceeding which followed the incident. He was sworn and told the truth. When the trial was ended, the union brought charges against the witness for conduct unbecoming a union member because he testified against a brother member in Court. The witness was ousted by the union and thereupon, the union demanded that the employer discharge the witness under the maintenance of membership clause in the contract because the witness was no longer a member in good standing, and the company was obliged to let the man go."

Statement of William L. McGrath, president of the Williamson Heater Co., Cincinnati, Ohio, made before the United States Senate Committee on Labor and Public Welfare, March 7, 1947.

On freedom of petition, DeMille said:

"The First Amendment further forbids Congress to abridge the people's right 'to petition the Government for redress of grievances.' But a Massachusetts teamster was expelled from his union because he appeared before a legislative committee on behalf of a bill that the union opposed."

DeMille's own case is a good illustration. He was denied the right to work in radio because of his refusal to contribute money to support a political campaign which he opposed.

On the due process clause, DeMille comments as follows:

"The Fifth Amendment states that, 'no person shall be * * * deprived of life, liberty or property, without due process of law.' For any union member

to appeal to the courts is practically equivalent to signing his death warrant as far as his union membership is concerned. In Hollywood, three members of one union were suspended for appealing to the courts against a political assessment—and two others were suspended because they spoke up in a union meeting in defense of the other three."

As to the adequacy of the remedy of appeal through union trial boards and conventions we again quote from DeMille:

"The union constitutions provide for appeals from the local trial board all the way up to the national convention. The convention may be anywhere from one to five years from the time the member was expelled. How many wage-earners can wait that long without working?

"It is notorious that some union trials are a travesty of justice. It is not unknown that a man's very accusers are appointed to serve on the board that tries his case!

"The average union member cannot take his case to court. Most courts will insist that he first exhaust his remedies within the union—which may mean months or years of carrying a pre-judged case through the farcical mumbo-jumbo of appeals from one union body to another.

"But suppose he does exhaust his so-called remedies within the union and is still not satisfied that justice has been done him. He may then go to court—and face, with his meagre resources, the expensive talent of the union's legal department and the union's increased determination to make an example of him. Let us be realistic. How many workers—even if they were working steadily—could afford the long drawn-out litigation thus forced upon

him? How much less can a man afford it when he has been out of work for months or years.

"The average man has absolutely no available redress of wrongs done him by a closed shop union. The average union member, wronged by his union, has to battle with empty hands—with hands emptied when the union took away his right to work. What chance has he? To say that he has any chance is to deal in fictions as cruel as they are unreal.

"It is not surprising that men and women with no income but their wages, with families to support and educate, many with debts to pay, have submitted to wrongs imposed by closed shop unions rather than face the impossible task of seeking redress."

The following examples of expulsions from unions resulting in the loss of workman's job are included, although they do not fall into any of the foregoing categories:

"In a statement before the National War Labor Board on April 20, 1943, Mr. Prentiss gave specific examples of cases in which compulsory unionism severely limited the rights of an employee to work at his job. In one of the plants of the Armstrong Cork Co. the agreement contained a union-shop clause and a no-strike clause. Disregarding its contractual obligation, the union called a strike. Two of the employees, believing the strike to be unlawful (as it was), refused to join the picket line. Therefore, the union demanded that these two employees be discharged, and the company reluctantly complied. As Mr. Prentiss stated: 'May I ask the public members of the Board how they would feel if they were put in the position in which I was placed, of having to authorize the discharge of two efficient

workers who had done only what their consciences and their contract demanded.' ".

"Management at the Bargaining Table" by Hill and Hook, McGraw-Hill Book Co., 1945, p. 153.

"Walfred J. Stellberg, member of the AFL Milk Drivers Union in Duluth for fifteen years, was fined $1500 by his union. He was unable or unwilling to pay the fine, and the union demanded his discharge. Why was this good union member fined? The reason is enlightening. His wife, Esther I. Stellberg, worked as a supervisor and department head in a department store. When the clerks of that department store struck in a dispute with their employer, Mrs. Stellberg continued to work, since she was not a member of the department store union and since she desired to protect the rights and privileges accruing to her as a result of 26 years service with the same employer. Mr. Stellberg was told by his union that his wife must refrain from working during the clerks' strike. Mr. Stellberg attempted to persuade his wife to stop work, but she had a mind of her own and continued working in the department store. It was for this heinous offense that Union Member Stellberg was fined $1500 and the union demanded his discharge. Since the same union held closed shop contracts with other milk companies in Duluth, the action of the union prevented him from obtaining employment with any other milk company in the area. When Stellberg sued the union in court, the union withdrew its fine and suspension and settled the case out of court."

Digested from Duluth Herald, 11/16/46.

Admission to membership in certain unions is often limited by the unions in such a way that very unfair restrictions are placed on the opportunity of workers to earn a living. Here are some illustrations:

"Then there is the exploitation of labor by labor. At Fort Meade the Steamfitters' Union admitted only six new members during the peak of construction; thus the favored few on the inside were able to work overtime at double pay, earning $150 a week. The electricians, instead of admitting new members, levied a daily fee of $1 or $2 per man for a working permit. The carpenters went to the other extreme, taking into the union a mass of untrained and incompetent men bound to be discharged soon after paying their admission fees. The New York Times reports that the Union 'take' from this source was over $400,000.

"Some unions have such high admission fees that it is almost impossible for the average man, no matter how well qualified, to join. The truckers in Seattle, for instance, charge $500. The Motion Picture Union in Cleveland grabs $1000. And the Glaziers' Union in Chicago demands a cool $1500 for the right to work.

Thurman Arnold in "Labor's Hidden Holdup Men," Readers Digest, June, 1941.

"The AFL has a closed shop contract on the construction of a large power plant near St. Louis. Using this as a club it is requiring $150 initiation fees from all skilled workers and $50 from unskilled laborers. It is estimated that 5,000 workmen will be needed to rush the plant to completion. At an average take of $100 apiece, the initiation take will amount to around $500,000."

Drew Pearson and Robert Allen in Washington Merry-Go-Round, Dec. 31, 1940.

"Corwin D. Edwards, of the United States Department of Justice (in an address before the American Economic Association, December, 1941), cited the case of welders being forced to pay admission fees

and dues to nine separate AFL unions and gave an example of one welder who paid $650 in one year to obtain the right to work.

"The hodcarriers' local in Baltimore increased its union treasury from $2,590 to $89,500 in a five-months period in the winter of 1940 and 1941 by selling work permits.

St. Louis Union Trust Company Letter, February, 1946.

"Perhaps the greatest menace to the public occurs when a closed shop is combined with a closed union. In such cases, membership is so restricted that the union in effect prevents anyone from entering the occupation. For instance, in New York City, a union of newspaper deliverymen provides that no one can become a member of the union unless he is the legitimate son of a member of the union! People are thus prevented from working at an available job even if they *want* to join the union."

From N. A. M. Industrial Relations Department pamphlet on "The Closed Shop."

These, of course, are mere examples. The necessity of keeping this brief within limits prevents an endless recitation of similar instances.

With the presumption that the legislation is an exercise in the interest of the public, reinforced with knowledge by the court, from Congressional Committee Reports and numerous other sources, of the evils which the Right-to-Work Amendment is designed to and obviously will correct, how can it be possible for any judge to say that the legislative decision is without rational basis?

But we have so far only discussed the primary object of the legislation.

B. Secondary Objects of Right-to-Work Amendment.

1. Elimination of Strikes and Boycotts Called to Force Employers Into Compulsory Union Membership Contracts.

While it is true that the publications of the Bureau of Labor Statistics do not show demands for compulsory membership contracts as the primary issue in a large proportion of strikes in recent years, nevertheless the number of strikes over that issue is very substantial. The numerous compulsory union membership contracts which have been signed were not agreed to by employers without strikes or threats of strikes. That is, of course, excepting such contracts as were forced on employers by the War Labor Board to prevent strikes during the war period. Because union leaders know that the public is not sympathetic with demands for compulsory union membership contracts, for public relations purposes, they are careful to announce that a strike is called to obtain better wages. They are reluctant to agree on the wage issue until the matter of compulsory union membership is first or simultaneously agreed upon.

The records of this court are not lacking for cases involving strikes for compulsory union membership contracts. *Apex Hosiery Company* v. *Leader*, 310 U. S. 469, 84 L. Ed. 1311, 60 S. Ct. 987, 128 A. L. R. 1044 (1940), is an illustrative case occurring after the National Labor Relations Act went into effect. Although only eight of the Apex Hosiery Company's twenty-five hundred employees were members of the union, the union demanded a closed shop, and on the refusal of the Company to grant it, union members from other factories in Phila-

delphia, acting under the direction of the union president, seized the Company's plant and held it for several weeks. Its equipment and machinery were wantonly demolished and damaged to the extent of many thousands of dollars. Concededly the purpose of the union and its principal objective was to compel the company to yield to its demand for a union shop. This court held that damages were not recoverable under the Federal Anti-Trust Acts.

Other illustrations of strikes for closed-shop contracts are found in *Hunt* v. *Crumboch*, 325 U. S. 821, 89 L. Ed. 1954, 65 S. Ct. 1545 (1945), and *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945), of which more later in this brief.

The *Monthly Labor Review*, published by the United States Department of Labor, Bureau of Labor Statistics, in the May, 1948, issue at pages 480 and 481, reports:

> "An 11-month stoppage of approximately 11,000 production workers of the West Allis, Wis., plant of the Allis-Chalmers Manufacturing Co. was terminated March 23, when the strikers voted by a ratio of 3 to 1 to accept an 18½-cent hourly wage increase. *The most controversial issues, however, remained unsolved—continuation of a union shop* and revised grievance procedure. The second and smaller stoppage, which had continued for nearly 15 months at the farm-equipment plant of J. I. Case Co. in Racine, Wis., was terminated March 9. This settlement provided for an 18-cent wage increase, but contained no provision for *the closed shop* or compulsory check-off, *the issues which had prolonged the dispute.*" (Emphasis ours.)
>
> "The first large strike of 1947 and the first major telephone strike ever to occur in this country, began

April 7 when about 370,000 telephone workers walked out after weeks of fruitless negotiations. This strike continued well into May, thereby concentrating the year's peak of strike idleness in April and May. The principal unions involved, affiliates of the National Federation of Telephone Workers (Ind.), presented a generally uniform series of 10 demands to the various Bell System companies. In addition to wages, *the key issues were establishment of a union shop*, protection against lay-offs, and an improved pension plan." (Emphasis ours.)

Boycotts to force compulsory union membership contracts on employers whose employees are not union members are frequent. Such boycotts are imposed by unions having union shop contracts with one employer to make other employers force their unwilling employees into the union although a majority of the second employers' employees may not desire to join that particular union, and even may be members of another union.

Illustrations of this sort of thing might be collected ad infinitum. Here are three illustrations that were used in the pamphlet published by the "Right-to-Work Committee" in presenting the Right-to-Work Amendment to the voters of Nebraska:

"DELAY DELIVERY OF FARM EQUIPMENT

"Here is a story taken from the files of Docket 391, No. 366 of the District Court of Douglas County, Nebraska.

"McAllister Transfer Co. has headquarters at York, Neb., and hauls merchandise for H. A. Zethren, owner of the local Coast to Coast Store, an important outlet for implements and other farm equipment.

"Early in 1946, certain labor bosses of the Omaha Teamsters Union Local 554, telephoned the McAllister manager and suggested he sign a closed shop contract compelling his employees to join the union and pay dues. McAllister's manager agreed to do so —provided his drivers wanted to join. But when approached, McAllister's employees told the labor bosses they were perfectly happy, had good working conditions and could not see how the union would benefit them.

"On May 6th, a McAllister driver stopped at the Omaha dock of Merchants Motor Freight, Inc. to pick up a shipment billed to Zethren's Coast to Coast Store at York, from Coast to Coast warehouse at St. Paul, Minn. A union checker told the driver: 'McAllister Freight. Can't give you no freight.' The driver asked 'why?' Said the checker, 'they are non-union operators. I don't want to be fined $25.00 for giving it to you.'

"Shipments of saws, posthole diggers, cultivators, chicken feeders, welding equipment and other farm equipment badly needed by the farmers around York, Neb. continued to pile up on the Merchants Motor Freight dock until McAllister's attorneys were able to obtain a temporary injunction restraining the union from holding up the shipments.

"HOLD UP SHIPMENTS OF VITAL MEDICINES

"This story comes from case 12345, Docket 42, No. 245 of the District Court of Adams County, Nebraska. In spring of 1946, another labor boss set about to organize the Coffey Transfer Co. at Alma, Neb. Finding his employees were not interested in joining, owner Tom Coffey refused to sign a closed shop contract which would compel every employee to join the union and pay dues.

"On May 20th, Coffey Transfer picked up a shipment of two boxes of drugs and medicines from

McKesson Robbins at Omaha. These drugs were consigned to E. J. Dulifta at Farwell, Neb. Coffey hauled this shipment on 'open routing' from Omaha to Hastings. At Hastings he asked Borley Storage and Transfer Co.—agents for Nielsen & Peterson Transfer Co. who carry to Farwell, Neb.—to take the shipment. Borley refused saying he had been ordered by a labor boss not to take any freight from Coffey Transfer. Borley further said he would not dare oppose this order.

"Coffey then spotted a Nielsen & Peterson truck and asked the driver to take the shipment. But the driver replied, 'I would be fined $25.00 by the union if I accepted it.'

"Coffey tried to get every unionized transfer company in Hastings to accept the medicine shipment but found that he was on the labor boss' 'black list.'

"ASSESS AND FINE WORKERS

"The Unionist—official publication of the A. F. of L. in Nebraska—reports in its issue of April 26, 1946, that: 'The organization drive being conducted among Omaha dairies will continue until ultimate goal—100 per cent organization of all Omaha dairies is concluded—according to Sam Winsky, business agent of General Drivers Union No. 554.'

"The article further states: 'Meanwhile, Omaha Central Labor Union at its regular meeting Friday night voted to keep three recalcitrant dairies on the "We Do Not Patronize List."'

" 'The Drivers organization has adopted a legislation which penalizes members to the amount of a $25.00 fine if found guilty of patronizing a non-union dairy,' said the Unionist."

The Right-to-Work Amendment eliminated such strikes and boycotts by making the obtaining of a compulsory union membership contract impossible.

2. Equalizing Bargaining Power.

It is submitted that existing legislation gives the unions equality of bargaining power without compulsory union membership contracts, and that such contracts give unions much more than equality of bargaining power. It is the industries where the closed and union shop are most commonly found, that are most subjected to feather-bedding. A brief description of some of these practices is set out in "Trends in Collective Bargaining" written by S. T. Williamson and Herbert Harris, and published by the Twentieth Century Fund. (N. Y. 1945.) We quote from pages 108 and 109 as follows:

> "* * * building trade locals have set up all manner of restrictions against labor-saving tools, practices and factory-prepared materials which would otherwise shorten the time they spend on a job. Some plasterers refuse to handle gypsum boards, and Boston plasterers limit the size of their hods. Bricklayers seek to ban hollow tile either by union regulation or municipal ordinance. In some cities all concrete must be mixed on the job. Painters try to persuade city governments to pass ordinances against the use of lead paints in spray guns. Milwaukee carpenters require all hardware to be fitted on the job. Glaziers' unions try to forbid off-the-job glass installation work. New York steamfitters demand all pipe cutting and threading to be done on the premises.
>
> "These are a few of a long catalogue of union restrictions in the building trades which do more than they should to make building expensive. Largely

because of weakly organized contractors and of strong unions entrenched against change, technological advance has been obstructed in this industry."

The following is from pages 112 and 113:

"Restriction of output, however, is a tradition in printing trades unions. Many of these restrictions and regulations of working conditions never reach the stage of collective bargaining but are imposed upon employers in the shape of highly detailed union 'laws.' The pressmen's locals insist upon having a say about the number manning a press crew; which was partially responsible for the migration of magazine printing plants from New York City. Weirdest of all make-work rules in the printing trades is one governing the acceptance in newspaper composing rooms of advertising plates and of advertising matter which has been set in outside print shops. Under typographical union 'law' this matter may be used, provided a duplicate of it has been set up in the newspaper plant—and discarded."[27]

[27] "This restriction corresponds to one in the musicians' union which requires the presence of union 'stand-ins' when nonunion musicians perform over radio stations."

Like the building trades and the printers, the American Federation of Musicians has been one of the most successful unions in obtaining union shop contracts. To quote the report of the House Committee on Education and Labor on the Labor-Management Relations Act of 1947:

"(17) 'Featherbedding': In this bill, as in the Lea bill, which passed both Houses last year by large majorities and now is law, an attempt is made to deal with a problem that is becoming a more and more serious menace to the productivity of our country and to the manufacture of goods at a cost within the reach of the millions of our citizens.

"The present bill is substantially less drastic than the Lea bill. The latter aimed to eliminate the practices of the American Federation of Musicians, which, under the leadership of J. Caesar Petrillo, requires employers to hire people who do no work, to pay for people the employers do not hire, and to hire more people than the employers have work for."

Examples of feather-bedding and other similar practices of unions which have obtained an overbalance of bargaining power due to compulsory union membership are given in "Labor's Hidden Holdup Men," the article written by Thurman Arnold and published in the Readers Digest of June, 1941. We quote the following:

"Everybody knows that labor unions are causing paralyzing strikes in national defense. Such strikes are dramatic and receive spectacular publicity; for that very reason the problem does not worry me greatly. Public opinion is already forcing a solution.

"The labor problem I am most worried about doesn't get headlines and the public doesn't know what is happening. That is why it is the most dangerous of all.

"It is the exploitation of low-income consumers, the destruction of small, independent businesses and the levying of tribute upon the workmen themselves by a few powerful strategically placed unions. These are unions which control the lines of communication between producers and consumers. They have erected toll bridges over which the necessities of life must pass. Usually without strikes, they can tell consumers what and from whom they can buy and how much they must pay. The consumers are victims of a hidden holdup against which there is no protection.

"These middlemen of labor—teamsters, carpenters, plumbers, electrical workers, glaziers, and so on—use many methods to exploit consumers unmercifully.

"One method is to force the employer to hire extra men for no good reason. The teamsters in New York decided that every truck entering the city must take on an unnecessary man who gets $9 a day for doing no work. That's why it costs $112 more to distribute a carload of vegetables through the Manhattan market than in neighboring regions free of labor exploitation. This idea was too good not to be imitated by unions all over the country. Electricians' unions in various cities insist that a full-time electrician be hired on any construction job using temporary power or light. Frequently he spends his day playing solitare; his 'work' consists of pulling a switch one way when he arrives, the other way when he quits. Many operating engineers' unions will not allow a man to be hired for less than three days; if his employment exceeds that period he must be hired for a whole week.

"To milk dealers in New York who are willing to furnish milk at lower prices by keeping depots open only an hour and a half a day, the union says 'No.' Dealers must hire a full complement of labor full time, or shut up shop. Somebody in Dubuque had the bright idea that the delivery cost of two or three quarts of milk was the same as one. Therefore he offered a lower price to consumers who took more milk for their children. Here also the union said 'No.' In Chicago milk was being sold at lower cost to consumers willing to buy it at stores. The milk wagon drivers stepped in, and the more expensive system of bottle delivery was forced on low-income groups.

"By making alliances with each other, such unions extend their power to exploit consumers. Students at the University of Chicago formed a co-operative club. They bought milk cheaply from a farmers' co-operative. The milk wagon drivers told them to stop. The students insisted that in a free country they could buy where they pleased. So they had to be taught a lesson. First the union cut off their food deliveries. The students carried their own food. Then the union cut off their garbage service. The students capitulated.

"These 'middleman' unions likewise stop improvements in materials and methods. Look at what the Hod Carriers' Union is doing to Chicago. To mix concrete mechanically at a central plant and carry it to the job in trucks with revolving mixers improves quality and cuts down building costs—and subsequent rentals. But the Chicago hod carriers refuse to allow use of truck mixers.

"In Belleville, Ill., unions have been indicted with dealers and contractors for preventing the building of houses with prefabricated structural parts. In Houston, Texas, plumbers insisted that pipe made for particular jobs would not be installed unless the thread were cut off and a new thread made on the job. In Chicago, sash, frames and screens must be primed, painted and glazed on the job. Plumbers and electricians in other places insist that pipe cutting and wiring must be done on the job—more expensively than at the factory. Painters' unions in many districts will not permit the use of spray guns; brushes make more work. Similarly, in Washington, D. C., machinery must not be used to cut wire or thread pipe.

"It costs $1000 more to build a six-room house in Cleveland than in Detroit. Why? One reason is that contractors who use prefabricated materials or eco-

nomical methods are afraid to do business in Cleveland.

"Incidentally, nobody gets that extra $1000. Houses simply aren't built. In 1939, FHA loans for houses in Detroit totaled $59,000,000; in Cleveland, only $21,000,000. Not even organized labor profits. Cleveland carpenters made more by the hour; but Detroit carpenters had more work and larger annual incomes. Where high costs restrict building, the housing shortage gets more acute and labor has to pay higher rents out of less income.

"Many unions resort to the device of erecting local embargoes. In Chicago, a building trades council will not allow the use of stone which has been cut in Indiana. It must be brought in rough which increases freight costs 20 per cent; it must be cut in Chicago, though the quarries are more efficiently equipped to do the work. In Pittsburgh and San Francisco, carpenters' unions prohibit the use of millwork made out of town. New York metal lathers will not touch lath fabricated outside the city. All this flimflam, which is spreading all over the country, might be funny if it were not so expensive to people with low incomes who have to cut down on food in order to pay higher rents.

"Another threat of the holdup unions is to business competition and to the existence of small independent business concerns. In Washington, the teamsters threatened to strike to compel certain stores to increase the price of bread, the whole maneuver pleasing other retail stores that did not like the competition of a larger loaf for the standard price.

"Think of the owner of a little clothing store in Washington who had his shop painted by a CIO union. He then was picketed to compel him to have his shop repainted by the AFL union. He couldn't afford that expense."

Would employers agree to such union demands if the unions did not have much more than an equality of bargaining power?

3. Promotion of Business Efficiency.

Of course what we have already presented clearly indicates how compulsory union membership contracts hamper business efficiency. However, there are some phases of this point which have not already been covered which we would like to present in the words of Dr. Leo Wolman, who for eleven years was in the service of organized labor as Research Director of the Amalgamated Clothing Workers of America. He subsequently became professor of Economics at Columbia University. He is a well known authority on labor matters and his statistics on union membership for certain periods are published by the Bureau of Labor Statistics of the Department of Labor because of the lack of official figures. In 1942, Dr. Wolman wrote a series of editorials on current labor problems for the Washington Post. Because of Dr. Wolman's background his views are particularly illuminating. The following is an excerpt from one of these articles:

> "The closed shop is the climax of a union's efforts to win recognition and status. Once the Union has wrested this major concession from the employer, it is in a position to begin to apply its full power. * * * Thereafter the right of management to make decisions on a score of matters affecting the conduct of the business and the shops is progressively and cumulatively restricted and more and more authority passes into the hands of the union and its officers. To this development the closed shop is the key.

"The importance of the closed shop in this connection derives from the power a closed shop union enjoys over hiring and firing. Men look to the union, not to the employer, for their jobs and depend upon the union to protect them against discharge. The stronger a union the tighter becomes its control over these vital functions. Responsibility for shop discipline, which is at first divided between union and management, rests at last largely with the union itself. At the same time a complex system of regulations governing promotion, the order of lay-off and rehiring, the disciplinary rights of supervision, and a multitude of related questions gets introduced into the factory's work rules, is frequently amended in the interest of greater precision and detail, and tends to become increasingly inflexible in enforcement.

"Sharing Of Authority—This sharing of authority and relaxing of discipline, which organized labor's control of employment entails, spread meanwhile to practically all shop rules and practices. Methods of wage payment are called into question and are modified or replaced by others, as time work has replaced piece work in the automobile industry. The pace of work becomes subject to joint determination and frequent revision. New methods of work and new machinery can be adopted, if at all after consultation and with the consent of the union, and only then if the conditions of their operation are prescribed in advance and faithfully observed. In case of old and long-established unions extreme regulations of the sort applied by the building and musicians' unions go so far as to ban certain types of work altogether, professedly in order to protect the jobs of union employees.

"Beginning as a simple measure of union security, the closed shop thus flowers into an elaborate struc-

ture of restrictions and prohibitions. In consequence, unions operating under the closed shop tend to exhibit their least praiseworthy features, for the comparative freedom from curbs and checks which the closed shop assures a union encourages the use of restrictive and obstructive practices, to which unions are anyhow strongly addicted. To the efficient management of American industry these results of the more general adoption of the closed shop constitute the most serious threat of our current labor policy.

"Perhaps the support the Government is lending to one form or another of compulsory unionism is not too high a price to pay for a ban on strikes and organized labor's cooperation for the duration of the war. But it should be observed that everything we do has remote, as well as immediate effects. We should be well advised to think twice before we instruct our leading Government agencies to take the easy way in conceiving and interpreting the labor policy of this country during the next years."

4. PROTECTION OF EMPLOYERS AGAINST BEING ARBITRARILY PUT OUT OF BUSINESS BY USE OF COMPULSORY MEMBERSHIP CONTRACTS AND SECONDARY BOYCOTTS.

An illustration from the opinions of this court of the power of unions with compulsory membership contracts to put employers out of business is *Hunt* v. *Crumboch*, 325 U. S. 821, 65 S. Ct. 1545, 89 L. Ed. 1954. The following is from the opinion of the court:

"For about fourteen years prior to 1939, the petitioner, a business partnership engaged in motor trucking, carried freight under a contract with the Great Atlantic & Pacific Tea Co. (A & P). Eighty-five per cent of the merchandise thus hauled by petitioner was interstate, from and to Philadelphia,

Pennsylvania. The respondent union, composed of drivers and helpers, was affiliated with other A. F. of L. unions whose members worked at loading and hauling of freight by motor truck. In 1937, the respondent union called a strike of the truckers and haulers of A & P in Philadelphia *for the purpose of enforcing a closed shop.* The petitioner, refusing to unionize its business, attempted to operate during the strike. Much violence occurred.

"A & P and the union entered into a closed shop agreement, whereupon all contract haulers working for A & P, including the petitioner, were notified that their employees must join and become members of the union. All of the other contractor haulers except petitioner either joined the union or made closed shop agreements with it. The union, however, refused to negotiate with the petitioner, and declined to admit any of its employees to membership. Although petitioner's services had been satisfactory, A & P, at the union's instigation, cancelled its contract with petitioner in accordance with the obligations of its closed shop agreement with the union. Later, the petitioner obtained a contract with a different company, but again at the union's instigation, and upon the consummation of a closed shop contract by that company with the union, petitioner lost that contract and business. Because of the union's refusal to negotiate with the petitioner and to accept petitioner's employees as members, the petitioner was unable to obtain any further hauling contracts in Philadelphia."

The court held the union's action did not violate the Federal Antitrust laws. Four justices dissented. In his dissenting opinion Justice Jackson said:

"With this decision, the labor movement has come full circle. The working man has struggled long,

> the fight has been filled with hatred, and conflict has been dangerous, but now workers may not be deprived of their livelihood merely because their employers oppose and they favor unions. Labor has won other rights as well, unemployment compensation, old-age benefits and, what is most important and the basis of all its gains, the recognition that *the opportunity to earn his support is not alone the concern of the individual but is the problem which all organized societies must contend with and conquer if they are to survive.* This Court now sustains the claim of a union to the right to deny participation in the economic world to an employer simply because the union dislikes him. This Court permits to employees the same arbitrary dominance over the economic sphere which they control that labor so long, so bitterly and so rightly asserted should belong to no man." (Italics ours.)

The people of Nebraska in adopting the Right-to-Work Amendment voted to place limitations on the "arbitrary dominance" which the labor union leaders otherwise might have. The Crumboch case is no isolated instance. Thurman Arnold, in his Readers Digest article, supra, cites similar cases. He says:

> "In Detroit three wholesale paper dealers are told by the teamsters' union to go out of business. There is nothing they can do about it. They are not allowed to hire union men; they cannot get their paper hauled. The union has made a deal with some employers to eliminate competitors. Likewise, 65 independent truckers in Pittsburgh are being forced out of business in spite of the fact that they are willing to hire union labor."

5. PROTECTION OF EMPLOYERS AGAINST BEING FORCED INTO MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE BY UNION LEADERS USING THE WEAPONS OF COMPULSORY UNION MEMBERSHIP AND SECONDARY BOYCOTTS.

Allen Bradley Co. v. *Local Union No. 3*, 325 U. S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945), was a suit brought by electrical equipment manufacturers from outside the City of New York to enjoin a combination of a labor union and local electrical equipment manufacturers and contractors in New York City to restrain competition in and to monopolize the marketing of electrical goods in New York City. In the opinion the court said:

> "To achieve this latter goal—that is, to make more work for its own members—the union realized that local manufacturers, employers of the local members, must have the widest possible outlets for their product. The union therefore waged *aggressive campaigns to obtain closed shop agreements* with all local electrical equipment manufacturers and contractors. *Using conventional labor union methods, such as strikes and boycotts, it gradually obtained more and more closed shop agreements* in the New York City area. Under these agreements, contractors were obligated to purchase equipment from none but local manufacturers who also had closed shop agreements with Local No. 3; manufacturers obligated themselves to confine their New York City sales to contractors employing the Local's members. In the course of time, this type of individual employer-employee agreement expanded into industry-wide understanding, looking not merely to terms and conditions of employment but also to price and market control. Agencies were set up composed of representatives of all three groups to boycott recalcitrant local contractors and manufacturers and

> to bar from the area equipment manufactured outside its boundaries. The combination among the three groups, union, contractors, and manufacturers, became highly successful from the standpoint of all of them. The business of New York City manufacturers had a phenomenal growth, thereby multiplying the jobs available for the Local's members. Wages went up, hours were shortened, and the New York electrical equipment prices soared, to the decided financial profit of local contractors and manufacturers. The success is illustrated by the fact that some New York manufacturers sold their goods in the protected city market at one price and sold identical goods outside of New York at a far lower price. All of this took place, as the Circuit Court of Appeals declared, 'through the stifling of competition,' and because the three groups, in combination as 'co-partners' achieved 'a complete monopoly which they used to boycott the equipment manufactured by the plaintiffs.' Interstate sale of various types of electrical equipment has, by this powerful combination, been wholly suppressed." (Italics ours.)

The court found that the combination was a violation of the Federal Antitrust Acts because of the inclusion in the combination of business concerns, but directed that the injunction be limited to enjoining combinations of the union with non-labor groups. In his separate opinion Justice Roberts objected to this limitation. He said:

> "There is no doubt that the programme adopted by Local No. 3 envisaged the exclusion, from the entire New York City area, of any electrical workers, whether engaged in manufacturing or installing electrical devices and equipment, except members of the Local. The organization from time to time increased the classes of members so as to add to its original membership of workers engaged in fabricating and installing electrical devices, equipment,

and apparatus the additional categories of shop employes engaged in manufacturing electrical equipment and all workers employed in alterations, additions, and repairs involving electrical equipment. It succeeded in unionizing and imposing closed shops employing only members of Local 3, not only on all building contractors, but on all repair contractors and their establishments and all manufacturers of electrical equipment. Membership in the union was closely restricted and the campaign eventuated in a situation where no electrical work could be done by persons other than members of the union, no building construction could be done by other than union men, no matter what their trade, and no manufactured electrical appliance or apparatus could be installed in the New York area without the consent of Local No. 3. That consent was given only if the device, appliance or apparatus was manufactured, or work done on it, by members of the Local. Complicated apparatus which had to be manufactured outside New York City, because no establishment making it existed within the city, had to be dismantled and rebuilt by members of the Local before it could be used in the New York area.

"It is true that before Local No. 3 obtained this complete control of the industry in its area of operation certain associated building contractors dealt jointly as an association with the union. As respects certain manufacturers which come under the dominance of the union this is not true. Nor is it true of repair businesses. On the contrary, it is the fact that each one of these was individually coerced by the union's power to agree to its terms. It is, therefore, inaccurate to say that the employers used the union to aid and abet them to restrain interstate commerce. Some of the employers, notably the building contractors, did jointly cooperate with the union; other sorts of employers were forced in-

dividually to comply with the union's demands, until all of them had succumbed.

* * *

"As I understand the opinion of the court, such a programme, and such a result, is wholly within the law provided only that employers do not jointly agree to comply with the union's demands. Unless I misread the opinion, the union is at liberty to impose every term and condition as shown by the record in this case and to enforce those conditions and procure an agreement from each employer to such conditions by calling strikes, by lockout, and boycott; provided only such employer agrees for himself alone and not in concert with any other."

Undoubtedly the situation achieved by Local Union No. 3 is that to which the A. F. of L. attorneys refer as "the ultimate goal of most union endeavor."

6. Protection of the Democratic Processes in the Unions Themselves Against the Tendency to Dictatorial Leadership Fostered by Compulsory Membership Contracts Which Deter Criticism of and Opposition to Existing Leadership by Threat of Expulsion From the Union With the Loss of the Right to Work.

The material we have presented under Point II-A of this brief, particularly the union constitutions authorizing expulsion from the unions of employees who openly voice dissatisfaction, or who seek to solicit votes for a change in the union program or officers, show that unions cannot well be democratic when compulsory union membership contracts enable union leaders to deprive of his right to work any member who criticizes them. But let

us add to that these quotations from enlightened union leaders.

Warren S. Stone, former head of the Brotherhood of Locomotive Engineers, said:

> "I do not believe in forcing a man to join a union. If he wants to join, all right; but it is contrary to the principles of free government and the constitution of the United States to try to make him join. We of the engineers work willingly side by side with other engineers every day who do not belong to our union, although they enjoy without any objection on our part the advantages we have obtained. Some of them we would not have in the union; others we cannot get. What I say is, make the union so good they will want to join."

Maurice R. Franks, National Business Agent of the Railroad Yardmasters of North America, Inc., in an interview with an Omaha World-Herald reporter on January 17, 1944, expressed himself as being utterly opposed to the closed shop and said:

> "They are dictatorial and undemocratic. Workers should want to join unions for the benefits they offer."

The Railroad Workers' Journal is the official organ of the Railroad Yardmasters of North America, a well known labor union. The following is a quotation from its editorial entitled "Closed Shop is Dictatorial," first published in its June, 1943, issue:

> "It is understandable why some labor leaders favor the closed shop, since it automatically eliminates the necessity of any great effort to attain their personal objectives. It places them in the position of a dictator. Their slightest whims must be

satisfied or their wrath felt through dictatorial discipline, such as depriving a worker of his right to earn a living if he does not wholly accede to their demands.

"The closed shop is beneficial only to labor leaders. It places them in supreme authority—even more authority than employers. It eliminates the employer's natural prerogatives of employing competent and discharging incompetent, unworthy, or unneeded workers. It makes the union leader sole judge of who shall or shall not be employed, or shall or shall not be entitled to union membership. If a worker is not admitted or if he is expelled from a union, even through no fault of his own, he is deprived of earning a living.

"Records disclose instances where workers, under a closed shop, were deprived of employment for having courage to voice opinions contrary to their leaders. Jobs were lost through failure to pay tribute in the form of exorbitant initiation fees, dues, assessments, and many more unjust reasons. Yes, the closed shop is truly named. It is closed to every one not in the good graces of the 'powers that be.'"

W. J. Brown, head of the Assistant Clerks' Association (A union of British Civil Servants), which in 1941 had a membership of more than 90,000, in an address entitled "Labor in Britain Today," delivered at the American Management Association Personnel Conference, Philadelphia, October 1 and 2, 1941, made the following statement which was reprinted in the American Management Association Personnel Series No. 51:

"In the *first* place, while I desire every man and woman in the field I cover should be a member of my union, I do not want 'conscripts' in my union.

"In the *second* place, the closed shop arrangement seems to me to sterilize an existing set-up to

the prejudice of organic development. Now life is not static, it is dynamic. And any attempt to enclose it in unchangeable forms sooner or later produces explosion.

"In the *third* place, the closed shop seems to me to deprive the individual trade unionist of his final remedy against incompetent handling of his affairs by his union—the weapon of resignation. If my members are not satisfied with the way I run their affairs, they can resign and either join another union or start one of their own. This tends to keep trade-union leadership competent, keen and on its toes. The closed shop seems to me to remove this incentive."

7. PROTECTION OF INDIVIDUAL WORKERS, UNIONS, EMPLOYERS, AND THE PUBLIC FROM THE RESULTS OF STRIKES, MONOPOLIES, FEATHER-BEDDING, RACKETEERING AND ABUSES AND INJUSTICES FOSTERED BY COMPULSORY UNION MEMBERSHIP CONTRACTS.

The loss of production due to strikes, in the end is a loss to the public. The increased costs of goods and services due to union-fostered monopolies and restraints of trade and to feather-bedding in the end is borne largely by the public. The racketeering methods of the "middle men of labor," to adopt Thurman Arnold's expression, exploit consumers unmercifully. The American working man, referred to in the Congressional Committee report, makes up a large segment of the public. The elimination of compulsory union membership contracts will clearly tend to protect the public against these evils.

III.

NATURE AND EFFECT OF MOTIONS FOR JUDGMENT ON THE PLEADINGS AND DEMURRERS.

Having reinforced the presumption that legislation is an exercise in the interest of the public, by showing that the objects of the Right-to-Work Amendment are protection of the lives, health, morals, comfort, and general welfare of the people, and that the Right-to-Work Amendment clearly has a real and substantial relation to the objects sought to be attained, we shall now proceed to examine the plaintiffs' petition to see by what allegations they seek to show the contrary. We shall examine the petition in the light of the law as to the nature and effect of motions for judgment on the pleadings and demurrers. On this the court below (R54) stated the law as follows:

> "As held by this court in Johnson v. Marsh, 146 Neb. 257, 19 N. W. (2d) 366: 'A general demurrer admits all allegations of fact in the pleading to which it is addressed, which are issuable, relevant, material, and well pleaded; but does not admit the conclusions of the pleader, except when supported by, and necessarily result from, the facts pleaded. It does not admit inferences of the pleader from the facts alleged, nor mere expressions of opinion, nor theories of the pleader, nor allegations of the pleader as to what will happen in the future, nor arguments, nor allegations contrary to the facts of which judicial notice is taken or which are contrary to law.' See, also, 41 Am. Jur., Pleadings, s. 244, p. 463, and Louisville & Nashville R. R. Co. v. Palmes, 109 U. S. 244, 3 S. Ct. 193, 27 L. Ed. 922.
>
> "Since a motion for judgment on the pleadings is in the nature of a demurrer and is in substance both

a motion and a demurrer, it has application in like manner as a demurrer under circumstances similar to those presented in the case at bar. See, Vaughan v. Omaha Wimsett System Co., 143 Neb. 470, 9 N. W. (2d) 792; State ex rel. Western Reference & Bond Assn. v. Kinney, 138 Neb. 574, 293 N. W. 393, reversed on other grounds as Olsen v. Nebraska, 131 U. S. 236, 61 S. Ct. 862, 85 L. Ed. 1305, 133 A. L. R. 1500."

We may add to those citations *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498, 39 S. Ct. 172, 63 L. Ed. 381 (1919); *Louisville & Nashville R. R. Co.* v. *Palmes*, 109 U. S. 244, 27 L. Ed. 922, 3 S. Ct. 193 (1883), and decisions of this court cited in *Rishel* v. *Pacific Mutual Life Insurance Company*, 78 Fed. (2d) 881, 131 A. L. R. 414.

The rule stated in *Johnson* v. *Marsh*, supra, was quoted from *Richter* v. *City of Lincoln*, 136 Neb. 289 285 N. W. 593, 594 (1939), which in turn quoted the above language from 6 Standard Encyclopedia of Procedure, 943-952. It is not a rule peculiar to Nebraska but is general law.

IV.

ALLEGATIONS OF PLAINTIFFS' PETITION EXAMINED.

(a) The allegations in paragraphs 1, 2, 6, 10 and 17 of the petition (R2,4,5,9), that plaintiff labor unions are voluntary associations, is, of course, a conclusion, the involuntary nature of the membership of a part of the members being made clear from the allegations that the unions would lose members and lose dues if they are not permitted to compel union membership by denying the right to work, to nonmembers.

(b) The allegation of paragraph 4 of the petition (R3) that the union shop is sought as a means of achieving equality of bargaining power is a conclusion. The court may well make its own conclusion, as did the voters of Nebraska, that it is sought as a means of securing an inequality of bargaining power overbalancing in the labor leaders' favor.

(c) The allegations in paragraph 11 (R6) that the most important collective bargaining agreements are those containing union shop or union security provisions and that the securing of such agreements is a necessary and indispensable concomitant of the assemblage of working people into labor organizations, and that the right to obtain and maintain such agreements constitutes a necessary and indispensable element of their proper functioning are conclusions, opinions, and predictions which are contrary to those which more logically follow from facts of which this court takes judicial notice.

(d) Whether union shop agreements and the right to enter into them constitute valuable property and civil rights in the plaintiffs as alleged in paragraph 12 (R7), is a conclusion of law which is not admitted by demurrer or motion for judgment on the pleadings. The allegations in the same paragraph that the union shop constitutes the most effective means of obtaining specified union objectives is a conclusion and opinion.

(e) With reference to paragraph 13 of the petition (R7), it would appear that the existence or nonexistence of a monopoly of the supply of labor is a conclusion. Of course, it is not a monopoly of the supply of labor the Right-to-Work Amendment aims to eliminate or prevent, but rather a monopoly of jobs—of the right to work.

(f) With reference to the allegations of paragraph 14 (R7) concerning admission to membership in labor unions in Nebraska the words "no arbitrary or unreasonable requirements" and "reasonable discipline" are allegations of opinion.

(g) The allegations of paragraph 15 (R8) that "all of the foregoing activities," and in particular union shop or union security activities, constitute the only effective means possessed by organized labor to accomplish economic security, etc., really allege nothing as to the union shop because it is coupled with "all of the foregoing activities," including legitimate activities. The allegation that "said activities are indispensable concomitants" of the right to organize and bargain collectively, is similar. But if the allegations are treated as applying to the union shop and union security agreements, taken singly and not as a part of "all of the foregoing activities," then they are conclusions and opinions and are contrary to those which more logically follow from the facts of which this court takes judicial notice.

(h) The enumeration of alleged benefits obtained through union shop and union security agreements in paragraph 16 (R8) of the petition is similar to that of paragraph 12, and the allegations are conclusions and matter of opinion and argument.

(i) The allegations of benefits in paragraph 25 (R11) are similar to those of paragraphs 12 and 16.

(j) The allegations of irreparable injury in paragraphs 28, 29, and 30 (R12,13) are not admitted by the motion for judgment on the pleadings, and the accompanying allegations predicting industrial strife, disruption of production, denial of collective bargaining, etc.,

are mere conclusions and predictions and are contrary to those which are more reasonably drawn from facts known to the court.

(k) The legal conclusions set forth in paragraph 35 (R16) of the petition are not admitted by the motion for judgment on the pleadings.

We shall proceed now with a discussion of the arguments contained in plaintiffs' petition, and in this connection we shall proceed to bring out additional facts and circumstances leading the adoption of the Nebraska Right-to-Work Amendment and showing the mischief it was intended to remedy.

In paragraph 12 (R6) of their petition, plaintiffs allege that the union shop or union security agreement constitutes the most effective means of obtaining certain benefits for labor organizations and their members. We pause to remark that a black jack and pistol are very effective means of obtaining benefits, but that is a poor argument for permitting their use. Plaintiffs list the benefits in subparagraphs as follows:

1. *Job Security and Protection from Employer Discrimination* (R7). There might have been some merit in this contention in the days when employers were free to discriminate against union men—to require yellow dog contracts, and to use the black list. But those days went into ancient history when the United States Supreme Court upheld the validity of the National Labor Relations Act which forbids discrimination on account of union membership or union activity. Added protection to union workers not subject to the Wagner Act is contained in this very Right-to-Work Amendment which protects

them as well as nonunion workers from discriminatory denial of employment or discharge. It is hardly an argument for the union shop that it is a means of accomplishing what has already been accomplished by statute. In this connection reference is also made to the allegations of paragraph 11 and paragraph 15 (R6,8) of plaintiffs' petition which may be attempts to say that the union shop is an indispensable concomitant of collective bargaining and strong unionism. Such a contention is obviously not true. This is illustrated by the fact that although the Railway Labor Act prohibits union security agreements, the railway brotherhoods are among the strongest unions. The Railway Labor Act outlawed discrimination and required collective bargaining. That was enough. The unions needed no compulsory union membership agreements.

In Great Britain and in Sweden trade unionism is very strong, but compulsory union membership agreements are rare. For a discussion of the British and Swedish situation we quote the following from "Democracy and the Closed Shop" by John Chamberlain, Fortune Magazine, January, 1942:

> "The Swedes haven't a word for the solution of labor disputes. But they have a practical attitude that usually results in peaceful arbitration without trenching upon the basic rights of any party to the struggle. It all goes back to the watershed year of 1909 when Swedish employers, fearing the growing power of the trade unions, declared a lockout designed to break forever the strength of the John L. Lewises of the day. Labor's reply, Lewis-like in its flaring intransigence, took the extreme form of a Syndicalist-inspired general strike. As each side girded for the struggle, the Swedish people of all classes looked suddenly into an abyss. As they saw

it in that fateful year, if the employers were to get their way, the result would be the practical enslavement of the working class. But if the general strike were to be pushed to a successful terminus, it would result in the practical engrossment of Swedish industry and government by the trade unions. In brief, Sweden stood on the verge of black or red revolution in 1909, an either-or dilemma that the Swedish people, many of whom were farmers and fishermen and small tradesmen, did not want in the least to accept. They didn't want to accept it any more than the people of the U. S. want to accept it today.

"But, as is usually the case in supposedly either-or predicaments, a third way out was discovered by the Swedes. Labor and the employers, as it turned out, didn't want the revolution any more than the rest of Sweden wanted it. Faced with the terrifying implications of their acts, both parties to the struggle drew back. The unions, unable to get their way by the tacit civil-war threat of the general strike, returned to the long, slow, hard road of organizing to gain their ends by persuasion. And the employers, frightened by the prospect of pushing for an industrial feudalism that was no true wish of the majority, decided to keep their hands off the unions.

"Theoretically, the Swedish employers had consented to abstain from union baiting earlier in the century. As far back as 1902 they had banded together into a federation of industry-wide associations to counter the vertically organized power of industrial unionism. On paper this Employers' Federation had a curiously enlightened constitution — a document designed not only to protect the association's own members but also to guarantee labor's right to collective bargaining. But prior to 1909 the constitution meant about as much to the Swedish

employers as the Wagner Act has meant to those U. S. industrialists who have chosen to regard it as unconstitutional. Nothing worked in Sweden until after 1909, the year that provoked the great change of heart.

"The change of heart was mutual. The employers had refused to grant the principle of the closed, or the union shop to Swedish labor: for the sake of efficient management, they reserved the right to hire and dismiss workers at discretion, or to employ workers belonging to any union or to no union. But to sweeten their refusal of the closed shop, the individual employers, secure in the knowledge that they had the strength of industry-wide association behind them, also voluntarily relinquished the habit of union baiting. Labor itself did not press for the closed shop principle; and Swedish unionists now feel that compelling a man to join a union does not make for good trade unionists. As for the check-off, Swedish labor opinion feels that such a practice encourages collusion between management and the union leaders that does not always bode well for the rank and file.

"Sweden is admittedly not Utopia. Neither is England, which settled its labor problem along Swedish lines during World War I and after the unsuccessful general strike of 1926. But the Swedish and British way—the relinquishing by labor of the demand for the universal closed shop and the voluntary abstention on the part of employers from union baiting and other forms of social pressure on workers to keep them from joining unions—is the only way in which the labor 'problem' can be solved without suppressing two basic liberties. These liberties are the right of a man to work as he wills under his own conditions and the right of an employer to keep a nonunion man if he is giving satisfactory service."

The following is from "Trends in Collective Bargaining" by S. T. Williamson and Herbert Harris, published by the Twentieth Century Fund, 1945, page 42:

"The Closed-Shop Issue Abroad

"European quarrels in the late nineteenth century over closed-shop questions were as bitter as those which still rage in the United States. In Great Britain and Sweden they were settled voluntarily—either informally or by agreement; in Germany they were ended by law.

"The subject was long an active issue in Britain. One factor in its virtual disappearance was British industry's eventual and almost complete acceptance of collective bargaining. Another factor was the attitude of nonunion labor which rarely supported management in industrial disputes; when a union called a strike in a plant, nonunionists also laid down their tools and walked out. Few British collective agreements now specify union membership as a condition of employment, and the union shop prevails not by agreement but by custom.[16]

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[16] "Except among the seamen and firemen in the shipping industry closed-shop agreements are exceptional, and do not appear to be seriously sought for. Nevertheless, we were told by both union and employer representatives that in some industries there is virtually a closed shop in practice, as distinguished from one by contract, the employers preferring to engage union men and in some instances, at the request of the union, suggesting to particular individuals that they should join. The checkoff is very exceptional and several union representatives stated their opposition to it." *Report of the Commission on Industrial Relations in Great Britain*, Government Printing Office, Washington, 1938.

"The closed shop was a turbulent question in Sweden until 1906, when it was settled by the Employers' Federation and the Confederation of Trade Unions. These two powerful and almost inclusive central organizations agreed upon a formula whereby employers understood to recognize workers' rights to organize, and unions recognized employers' rights

to engage and dismiss employees without regard to whether or not they were union members. The substance of this understanding was then written into virtually all collective bargaining agreements. The closed-shop versus the open-shop issue evaporated because of the very large proportion of workers who are union members and because the employers no longer try to break down union organization, preferring to deal with their workers through strong trade unions.[17]"

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[17] *Report of the Commission on Industrial Relations in Sweden*, Government Printing Office, Washington, 1938.

In view of the success of unions in Sweden, Britain and the United States railroad without benefit of union security contracts, and in view of the existing statutory provisions preventing discrimination against unions and union workers, it is ridiculous to contend that compulsory union membership clauses are necessary to successful unionism.

2. *Equality of Bargaining Power.* We have already discussed this point (see page 42 to page 48 of this brief). The facts show that compulsory membership contracts gives the union very much more than an equality of bargaining power.

3. *Preventing Wage Competition by Nonunion Employee.* Where the union has a majority in the bargaining unit, under the National Labor Relations Act it is the bargaining agent, and the nonunion employee could not engage in wage competition even if he was so inclined.

4. *Elimination of Free Riders.* The Nebraska Right-to-Work Amendment in outlawing compulsory union

membership differs from the subsequently enacted Federal Labor Management Relations Act in that the latter, while outlawing the closed shop, permits a union shop or maintenance of membership contract (where a majority of employees who would be covered by the contract vote for it and the union complies with other provisions of the law) to the extent of requiring payment of union dues and initiation fees only. Under the present federal law, the Right-to-Work can be taken away only for non-payment of the regular dues and initiation fees—not for any other violation of union laws. If union leaders were sincere in relying on the "Free Riders" argument, if they were sincere in their claim that they welcome regulation of union security agreements, they would applaud the Labor Management Relations Act, but they have denounced the union security provisions of the Taft-Hartley Act as vehemently as they do the Nebraska Right-to-Work Amendment. Actually the Right-to-Work Amendment is better than the federal law in that the right of the union member to withdraw his financial support from the union as a protest against bad union leadership or union policies or program, is a most effective guarantee that the union leadership will be responsive to the wishes of the rank and file and that the union policies and program will be constructive. See the quotation from W. J. Brown, head of the Assistant Clerks' Association, appearing at page 58 of this brief.

5. *Increased Union Responsibility.* Necessary discipline to require workers to perform their obligations may be imposed by the management if the union does not interfere with it. The discipline the union is more likely to exert is to force employees into attacks on their employers, rather than to force the workers to cooperate

with their employers. The discipline the closed shop enables the union to impose upon the workers is discipline to force them to cooperate with the union in such matters as secondary boycotts which may be used to force other employers to force their unwilling employees into the union, although a majority of the second employer's employees may not desire to join that particular union, and may even be members of another union.

For illustrations of this sort of thing, see pages 39-41 of this brief.

Union responsibility for their obligations under collective bargaining agreements when granted union shop contracts is illustrated by the experience of the Ford Motor Company which in 1941 signed a union shop checkoff contract. The press reported on November 30, 1941, that this contract, held as a "model" by union officials, had brought anything but industrial peace to the company. The New York Times on that date reported:

> "There has hardly been a day since the contract was signed that production operations have not been halted by wildcat strikes, slowdowns or other forms of labor unrest or disturbance, the company says. Company officials said that in twenty-six consecutive days this Fall there were twenty-six production interruptions."

On November 14, 1945, the Ford Motor Company by Mel B. Lindquist, superintendent of Labor Relations, wrote to the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, CIO, a letter which included the following:

> "The Company agreed in 1941 to the union shop and check-off provisions. Its purpose in so doing

was not only to give the Union the benefit of membership and financial security, but to eliminate a great deal of friction, dispute, and downright industrial strife.

"In return, the Company was assured by Union representatives that it would receive greater security and that disturbances of the type then prevalent in other plants would be avoided.

"That contract, with its union shop and check-off provisions, was hailed by Union leaders and others throughout the country as one of the most progressive steps ever taken by Union and management toward industrial peace.

"Our experiences in the last four years have substantially dispelled this hope. The peaceful relations have not materialized. The experiment has been an unhappy one. The record shows, for example, 773 work stoppages since the signing of that contract in 1941.

"During this period, the cost to the Company of maintaining the check-off system has been huge. Last year, for example, the Company spent $2,814,-078.36 in the Dearborn area alone to collect these dues and fees, and to pay more than 1,000 Union men in the Company's plants who spent all or part of their time handling Union business.

"From August, 1941, through October, 1945, the Company collected for the Union in dues, initiation fees and special assessments a total of $7,799,924.65.

"Last year the Union's income through the check-off system was $2,050,563.71.

"The result has been that the Union has had membership and financial security, but the Company has had no compensating security. This has become so serious that unless some provision can be arrived at in our negotiations to require the union

to recognize and fulfill a responsibility of its own, *the very future of the Ford Motor Company is at stake.*"

6. *Elimination of Jurisdictional Strife.* Jurisdictional strife can still exist where several different crafts, each having a closed shop contract, work in the same plant. They may fight over which one is to do certain work. Likewise, one closed shop union may refuse to work on material prepared by members of another union.

An illustration of the possibilities along this line is brought out in the statement of Frentress Hill, president of the Northern Redwood Lumber Company, before the House Committee on Education and Labor, March 3, 1947, and before the Senate Labor and Public Welfare Committee, on March 4, 1947. He was discussing the strike of the Lumber and Sawmill Workers of the United Brotherhood of Carpenters and Joiners against the Redwood Lumber Producers, to force union shop contracts on all of them. This strike began January 14, 1946, and was still on fourteen months later when Mr. Frentress made his statement. This statement is worth reading for its recitals of the many acts of personal violence, destruction of property, secondary boycotts, etc. arranged by union leaders in their attempt to force union shop contracts on this entire industry, but we quote only the following which is pertinent to the point now under discussion:

"The union has engaged in extensive primary and secondary boycotts, including the adoption by the General Executive Board of the United Brotherhood of Carpenters and Joiners of America, in April, 1946, of a resolution directing that the following law be inserted in the by-laws of all local unions

and district councils of the Brotherhood in the United States and Canada, to-wit:

> " 'No member will use, handle, install or erect any material produced or manufactured from wood not made by members of the United Brotherhood.'

"Parenthetically, gentlemen, if you will analyze the tremendous scope of that resolution or by-laws which every local of the Brotherhood of Carpenters and Joiners, including Sawmill Workers locals, was directed to insert in its by-laws, you will observe that it prohibits the handling of any lumber produced by CIO workers. This can and probably will lead to one of the most widespread and destructive jurisdictional disputes in history unless jurisdictional strikes are outlawed.

"To appreciate the tremendous scope of such a boycott, you should know that there are hundreds of CIO locals of Lumber Workers in the five western states producing several billions of feet of lumber yearly. The AFL resolution to which I have just directed your attention will prohibit every AFL union carpenter in America (and, I am informed, all union carpenters belong to the AFL) from using any CIO lumber."

To be sure, the union shop makes it difficult for employees who feel that they are not being well represented by their union, to withdraw from it and obtain representation more to their liking. An attempt to do so would probably result in the loss of their jobs. We appreciate the admission in subparagraph 6 of paragraph 12 of plaintiffs' petition that rival labor organizations do engage in raids and other disruptive tactics, but we think that the union shop and the demand for the union shop gives rise to much more disruption than it allays.

7.- *Labor Management Cooperation.* There is much more to indicate that the closed shop frees union energies for organization of boycotts and demands for feather-bedding than for constructive cooperation. To be sure, there have been good illustrations of constructive co-operation as in the clothing manufacturing unions. But unions can do the good they do without the union shop. Much of the evil they do they could not do without it.

Indeed if unions would give up their demands for the closed and union shops they would get more co-operation from the management of many concerns who quite reasonably are fearful and suspicious of many other union demands because they believe they may lead in the direction of the closed or union shop, and the "arbitrary dominance" they tend to give to union leaders.

Union Labor Monopoly. In paragraph 13 of plaintiffs' petition it is alleged that no labor organization in Nebraska has a monopoly. By this, apparently they mean they have not yet obtained a sufficient number of union shop agreements, which in paragraph 11 they allege to be an ultimate object of their organizations. Doubtless, they have not yet achieved a complete monopoly. But in the usual sense of the word, a monopoly consists of control of so large a part of the supply as to stifle competition and give the monopolist control over prices (or wages). The preventing of wage competition by non-union employees is alleged in paragraph 12 (3) of plaintiffs' petition to be one of the benefits of the union shop. If unions did not frequently constitute monopolies and restraints of trade there would be no need for the provision of the Clayton Act exempting them from the Sherman Act.

The illustrations commencing at page 39 of this brief are instances of the working of Labor Union Monopoly in Nebraska. The Crumboch case, page 50 of this brief, shows the working of a closed shop union monopoly. Another good illustration is *Allen Bradley Co.* v. *Local Union No. 3*, page 53 of this brief.

Admissions to and Expulsions from Unions. Paragraph 14 (R7) of plaintiffs' petition relates to admissions to and expulsions from unions in Nebraska. The allegation is doubtless intended to convey the impression that Nebraska unions, for the moment at least, are not subject to the same criticism as are other unions on the matter of admission and expulsion (see this brief, pages 22 to 36). But the words, "qualified applicants," "no arbitrary or unreasonable requirements," and "reasonable discipline" are conclusions and opinions. Perhaps the Nebraska Federation of Labor president, who verified the petition, would consider all of the illustrations of the tyranny of union leaders presented in this brief to be samples of "reasonable discipline."

Employers' Attitude. In paragraph 16 of plaintiffs' petition, the contention that some employers desire to maintain union shop contracts, may have some element of truth. Some employers have profited by the secondary boycotts their closed shop unions have inflicted upon their competitors. Some employers have been convicted of unlawful conspiracy with unions. More employers agree to union shop contracts in the hope of avoiding future harassment by the unions. But most employers are definitely opposed to union shop contracts. Witness the attitude of the National Association of Manufacturers, an organization of 16,500 manufacturing concerns em-

ploying 75 per cent of the manufacturing employees of the nation, but two-thirds of whose member companies employ less than 500 employees each. Witness also the position of the Nebraska Small Business Men's Association.

The attitude of the public at large is opposed to the closed and union shop. The Right-to-Work Amendment carried by a large majority in Nebraska. Public opinion in the country at large is likewise strongly opposed to the closed and union shops.

The result of a number of public opinion surveys presented in N. A. M. Industrial Relations Department pamphlet entitled "The Closed Shop" is as follows:

"PUBLIC OPINION POLLS

"Polls of public opinion have repeatedly shown that the closed shop meets with general disfavor.

"A Gallup Poll announced on January 20, 1947, shows that only 8% of the public favor the closed shop, 18% of the public favor the union shop over the closed shop, and 66% of the public favor the open shop (in which the employee may decide for himself whether or not he wishes to join a union).

"Even among union members themselves, only 19% favor the closed shop and 33% favor the union shop. As high as 41% of union members favor the open shop.

"A recent Opinion Research Poll showed only 7% of the public favoring the closed shop.

"Similar returns were obtained recently by radio station KQV of Pittsburg through a telephone poll. Only 16.8% voted in favor of the closed shop, while 83.2% were opposed. Even in labor areas a majority opposed the closed shop.

"The Minneapolis Tribune, polling Minnesota sentiment, found 57% favoring a state law to prohibit closed shops and 15% advocating a federal law.

"In a poll by Factory Management (McGraw Hill Co.—Jan. 1947), 70% of union members favored (by 2 or 3 to 1) outawing the closed and union shop.

"The question, 'Which do you favor, the open shop, the union shop or the closed shop?' had been asked of workers every year save one, since 1941. Analysis of these surveys presents two definite trends —a trend toward the open shop, and a trend away from the closed shop. Six years ago, about 3 out of every 10 workers favored the open shop; today about 6 out of 10 favors it. Six years ago, about 2 out of every 10 workers favored the closed shop; today only about 1 out of 20 favor it.

"Further evidence of workers' dissatisfaction with compulsory union membership was turned up by Factory in October, 1944. The question was this: 'Do you believe a man joins a union because he wants to, or because the union compels him to?' It was no surprise when 36% of nonunion workers said it was because he wants to. But among union members themselves, only a bare majority—56%—said that men join unions because they want to. And while 8% were undecided, 34% of union members frankly admitted that union membership is a matter not of desire but of compulsion."

To round out the picture of the unpopularity of compulsory union membership with employers, employees, the public and legislators, we quote the following from the opinion of the court below (R72):

"The people of this state initiated the amendment by original action, without legislative intervention, by filing petitions with the Secretary of State, which were signed by ten percent or more of the electors

of the state, so distributed as to include five percent or more of the electors of each of two-fifths or more of the counties of the state. At the election the amendment was adopted by a vote of 212,443 For and 142,702 Against. It is common knowledge that its provisions and purposes, as well as the reasons for its adoption or rejection, were widely publicized and ably presented to the electorate of this state prior to the election. It was adopted after considerate and deliberate action. Thus it was decided that its provisions were reasonable and necessary to safeguard the integrity of government and preserve the economic structure and security of the people for the protection of their welfare. With that decision, courts have no right to interfere.

"As conditions arising out of powerful industries required legislative regulation thereof to protect first the public generally, and then labor itself, which legislation courts generally have sustained, so now the people of this and other states have evidently decided that conditions have arisen in powerful industries and powerful labor forces as well, requiring legislative regulation of them both in order to protect the public. The Labor Management Relations Act of 1947 was ostensibly enacted for that purpose. As a basis for its enactment, Congress recognized, as disclosed by its committee reports, that such conditions were nation-wide in scope, and specifically provided for the integration of state laws therewith, characterized by the amendment already adopted in this state.

"We take judicial notice of the fact that at this writing no less than 18 states have enacted similar legislation, 6 by constitutional enactment and 12 by statutory provisions."

Record, page 70:

"In Muller v. Oregon, 208 U. S. 412, 28 S. Ct. 324, 52 L. Ed. 551, a statute regulating and limiting the hours of labor for female employees was sustained. In the opinion it was said: 'Constitutional questions, it is true, are not settled by even a concensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief oncerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.'

"In West Coast Hotel Co. v. Parrish, 300 U. S. 379, 399, 57 S. Ct. 578, 81 L. Ed. 703, 108, 108 A. L. R. 1330, it was said: 'The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adopted to check it. Legisletive response to that conviction cannot be regarded as arbitrary or capricious, and that is all we have to decide.'"

V.

ASSIGNMENT OF ERRORS EXAMINED AND REFUTED.

We pass to a discussion of the constitutional questions raised in plaintiffs' petition and which they preserve in

their assignment of errors. The fifth assignment of error is a general one repeating the first four which are specific, and which we stated in condensed form in our summary of argument at page 10 of this brief.

A. Freedom of Speech and Assembly.

In sub-paragraph 1 of paragraph 35 of their petition (R16), in their Assignment of Error No. 4 (R82), and in their brief, appellants assert that the First Amendment to the Constitution of the United States guarantees them the right to make and enforce compulsory union membership contracts. The "right of the people peaceably to assemble" is stressed as the source of the claimed constitutional protection. The argument is this:

(1) The right to form labor unions is guaranteed as part of the right of assembly;

(2) The right to make the union effective is included in the right to form a union;

(3) A union cannot be effective without compulsory union membership contracts;

(4) Therefore, a state ban on compulsory union membership contracts is repugnant to the First Amendment.

We would not dignify this argument by calling it plausible or even specious. Its invalidity has always seemed so obvious to us that in earlier stages of this litigation we devoted little time or space to answering it. But since appellants have devoted the major part of their brief to presenting this argument, we shall give it some attention.

We shall first deal with Step (3) in the above argument, the contention that a union cannot be effective without compulsory union membership contracts.

"Indispensability" of Compulsory Unionism.

At the outset we refer to the discussion of the railway labor unions in this country and the British and Swedish unions commencing at page 65 of this brief. Indeed, appellants in their brief have now modified their claims as to the indispensability of compulsory membership contracts to unions by such statements as the following:

> "absent statutory protection of the right of organization and an exclusive bargaining status" (appellants' brief, page 22).
>
> "in states where no equivalent statutory framework of protection is afforded" (page 22).
>
> "without the substitution of an equivalent protection of the basic right of self-organization" (page 27).
>
> "unions in these states must, at least in intrastate industries, rely now as in the past on traditional practices to secure their existence" (page 27).
>
> "in the absence of some equivalent statutory protection of the right of union organization" (page 37).
>
> "absent factors of state protection" (page 118).

Their claim now is that compulsory union membership contracts are essential to unions in industries whose labor relations are not subject to the National Labor Relations Act as amended, that is, which do not affect interstate commerce.

Just what industries would those be? In *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 83 L. Ed. 1014 (1939), this court said:

"Long before the enactment of the National Labor Relations Act it had been many times held by this Court that the power of Congress extends to the protection of interstate commerce from interference or injury due to activities which are wholly intrastate.

* * *

"The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small.

* * *

"The language of the National Labor Relations Act seems to make it plain that Congress has set no restrictions upon the jurisdiction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved.

* * *

"Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim de minimis."

We point out incidentally that it is specifically alleged in the petition in the case at bar that the employer, the appellee Northwestern Iron and Metal Company, is engaged in interstate commerce and is subject to the National Labor Relations Act (R4,5).

In the June 7, 1948, Labor Relations Reporter (Vol. 22, No. 11, 22 L. R. R. 87), it is reported that Robert N. Denham, general counsel of the NLRB, in a statement before a sub-committee of the House of Representatives, said:

> "The present thought of the Board—the present thought of my office, at any rate, and as indicated by some of the recent decisions of the Board—is that it is a rare case in which business does not affect commerce in some degree, and that where commerce is affected the Board has jurisdiction."

So the argument of appellants based on the claimed indispensability of compulsory union membership contracts is built up for some rare case where the federal law does not guarantee to a union the right to act as exclusive bargaining agent for all the employees of a bargaining unit of which its members constitute the majority. But even in such a case, the procedural pattern has been set by the federal law. Furthermore, the union and union members are protected by the Right-to-Work Amendment itself from discrimination in hiring and firing. The weapons of the yellow dog contract and the black list cannot be used by any anti-union employer in Nebraska. If with this protection the union cannot be effective, it is because it is unable to convince its prospective members that it has any good reason to exist. So much for the indispensability of compulsory union membership contracts.

We now turn to the second step in appellants' argument—their contention that the right to make the union effective is included in the right to form a union, the right to peaceably assemble. At this point the argument is simply absurd.

Guarantee That Union Be Effective.

Freedom of assembly means that people are permitted to gather together, enter into discussions, adopt resolu-

tions, etc. It cannot mean that the assembly must be effective in obtaining the results that those attending it might desire.

Does a state legislature which refuses to pass a soldiers' bonus bill deny freedom of assembly to the members of a veterans' organization which in convention has adopted a resolution asking for such a bonus? Or does a legislature which passes such a soldiers' bonus bill deny freedom of assembly to the members of a taxpayers' league which in convention has denounced the bonus bill? In either case the legislature has made one of these assemblies ineffective with regard to the particular legislation.

Is freedom of petition denied because the petition is ineffective in obtaining a desired end?

Is freedom of speech denied because the speech is not persuasive? Is freedom of the press denied because the editor may not force the public to read his paper? Is freedom of religion denied because converts may not be obtained by coercion or all who benefit compelled to pay for the support of the church? Quite the contrary. We find nothing in any of the cases cited in appellants' brief which tends to support their proposition. We will, however, devote a little attention to a few of these cases.

In *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184 (1921), 66 L. Ed. 189, at 200, this Court said:

> "A suit by an employee who seeks to hold a labor union liable for seeking his discharge by threatening to strike unless his employer discharges him stands

on a different footing from a mere effort by a labor union to persuade employees to leave their employment. There are in such a combination against an employee the suggestions of coercion, attempted monopoly, deprivation of livelihood, and remoteness of the legal purpose of the union to better its members' condition * * *."

In *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 at 641, 87 L. Ed. 1628 at 1639, it is said:

"Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

"It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent."

The following excerpts are taken from the opinion in *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, 85 L. Ed. 836:

"It is therefore relevant to remind that the power to deny what otherwise would be lawful picketing derives from the power of the states to prevent future coercion."

* * *

"A final word. Freedom of speech and freedom of the press cannot be too often invoked as basic to our scheme of society. But *these liberties will not*

be advanced or even maintained *by denying to the states* with all their resources, including the instrumentality of their courts, *the power to deal with coercion* due to extensive violence. If the people of Illinois desire to withdraw the use of the injunction in labor controversies, the democratic process for legislative reform is at their disposal. On the other hand, if they choose to leave their courts with the power which they have historically exercised, within the circumscribed limits which this opinion defines, and we deny them that instrument of government, that power has been taken from them permanently. Just because these industrial conflicts raise anxious difficulties, it is most important for us not to intrude into the realm of policy-making by reading our own notions into the Constitution." (Emphasis ours.)

In *Thomas* v. *Collins*, 323 U. S. 516 at 537 and 539, 89 L. Ed. 430 at 444, it is said:

"Accordingly, decision here has recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty. National Labor Relations Bd. v. Virginia Electric & P. Co., 314 U. S. 469, 86 L. Ed. 348, 62 S. Ct. 344. Decisions of other courts have done likewise. *When to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed.* Cf. National Labor Relations Bd. v. Virginia Electric & P. Co., supra. But short of that limit the employer's freedom cannot be impaired. The Constitution protects no less the employees' converse right. *Of course espousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause.* It is entitled to the same protection." (Emphasis ours.)

And in the concurring opinion of Mr. Justice Douglas joined in by Mr. Justice Black and Mr. Justice Murphy, it is said (323 U. S. 543, 544, 89 L. Ed. at 447):

> "No one may be required to obtain a license in order to speak. But *once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment. That is true whether he be an employer or an employee.* But as long as he does no more than speak he has the same unfettered right, no matter what side of an issue he espouses." (Emphasis ours.)

Forcing men into a labor union by taking away their right to work if they decline to join is neither speech nor assembly, but it is coercion. The limitations of the constitutionally protected right of free speech are passed when the speech, though it be speech, assumes the character of coercion.

A fortiori, no right to coerce workers into unions by compulsory membership contracts can be tacked onto the constitutionally protected rights of free speech and peaceable assembly as pretended concomitants thereof.

B. Equal Protection of the Law.

Assignment of Error 3 (R82) and sub-paragraph 5 of paragraph 35 of the petition (R19) assert that plaintiffs are deprived of the equal protection of the law by the Right-to-Work Amendment. But the assignment of error reflects a change of theory from the petition. Both assert that non-union workers are favored over union workers. The petition asserts that unions are discriminated against

as compared with other types of so-called voluntary organization, but that assertion is not found in the assignment of error. It brings up for the first time a theory that the Right-to-Work Amendment is discriminatory because, while it prohibits compulsory union membership contracts, it permits "employers to retain all their traditional methods of consolidating gains against competition of other employers and against demands of organized labor." Just what appellants' attorneys think should be done to prevent employers from consolidating their gains against competition of other employers does not appear. It may be they think that federal and state laws against monopolies and restraints of trade and other statutory regulations of business are not what they should be. But, even assuming that, it does not follow that the state cannot protect the right to work by prohibiting compulsory union membership contracts.

In *NLRB* v. *Jones and Laughlin Steel Corporation*, 301 U. S. 1, 781 L. Ed. 893, 57 S. Ct. 615, 108 A. L. R. 1352 (1937), the court said:

> "We have frequently said that the legislative authority, exerted within its proper field, need not embrace all the evils within its reach. The Constitution does not forbid 'cautious advance, step by step,' in dealing with evils which are exhibited in activities within the range of legislative power."

The statement in the assignment of error that the Right-to-Work Amendment permits employers to retain all of their traditional methods of consolidating gains against the demands of organized labor is simply not true. The Right-to-Work Amendment bans the use f the yellow dog contract and the black list by employers

just as surely as it bans the use of compulsory union membership contracts and the black list by unions. It protects the union man against discrimination in hiring and firing just as it protects the non-union man. It does give equal protection to both. The Nebraska amendment differs from the Arizona in that the latter does not prevent an employer from refusing to hire a union man or from discharging him because he is a member of the union. Even the Arizona amendment is not subject to attack under the equal protection clause as the Supreme Court of Arizona very well pointed out in its opinion in the American Sash and Door Co. case, which we quote as follows (67 Ariz. 20, 189 Pac. (2d) 912 at 920):

> "We must point out that the equal protection clause requires only 'that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' Hayes v. Missouri, 120 U. S. 68, 7 S. Ct. 350, 352, 30 L. Ed. 578. There is no question but that this test is here met. Nor is it necessary for the people to have encompassed in one constitutional amendment a corrective for all the evils which may or do arise in the field of employer-employee relations.
>
> "* * * This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulations to all cases which it might possibly reach. The Legislature 'is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.' If 'the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied.' There is no 'doctrinaire requirement' that the legislation should be couched in all embracing terms.

* * *" West Coast Hotel Co. v. Parrish, supra (300 U. S. 379, 57 S. Ct. 585).

There is much more in the opinion in that case on the subject of equal protection, and we feel that the opinion deals quite adequately with the question here raised. Inasmuch as that case is being heard on appeal together with this one, and the opinion will be carefully examined by this court, we will not repeat here any more of the discussion or citations there appearing. We will close our discussion of this point by this excerpt from the opinion of the Supreme Court of Nebraska in this case (R64):

> "Plaintiffs argued that the amendment constituted class legislation and denied unions and union members equal protection of the laws, contrary to the Fourteenth Amendment. We cannot sustain that contention. The amendment prohibits no one from joining a union, but undertakes to lawfully assert that neither membership nor non-membership in a union shall be a condition precedent to the right to work. It is inclusive of all employers and employees in this state. It does not deny the union member the equal protection of the law, but gives the non-union employee a protection of the law which he had not theretofore enjoyed."

C. Impairment of the Obligation of Contracts.

Assignment of Error No. 2 (R81) and sub-paragraph 2 of paragraph 35 of the petition (R17) assert that the Right-to-Work Amendment impairs the obligation of contracts entered into prior to the adoption of said amendment, all in violation of Article I, Section 10 of the United States Constitution.

The attention given to this assignment of error in appellants' brief is so slight that we believe we are entitled to consider that they have abandoned any argument based on the contract clause. However, since they have included it in their specifications of error, and do make some mention of it at page 87 of their brief, we have decided not to omit from this brief the following reply to the argument made by appellants in the court below:

The rule of law on this point is clearly stated in 12 Am. Jur., Constitutional Law, Section 421, as follows:

> "The constitutional protection of the obligation of contracts is necessarily subject to the police power of the state, and therefore a statute passed in the legitimate exercise of the police power will be upheld by the courts, although it incidentally destroys existing contract rights."

Numerous cases from the United States Supreme Court are cited in the footnote in support of the quoted proposition.

Among the United States Supreme Court cases supporting the above proposition is *Home Building and Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 78 L. Ed. 413 (1934), where the court said: "The police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

The following cases and others were quoted in the opinion of the court below (R76,77,78) on this point as follows:

"In Indiana ex rel. Anderson v. Brand, 303 U. S. 95, 108, 58 S. Ct. 443, 82 L. Ed. 685, 113 A. L. R. 1482, it was said: 'Our decisions recognize that every contract is made subject to the implied condition that its fulfillment may be frustrated by a proper exercise of the police power * * *.'

"In Manigault v. Springs, 199 U. S. 473, 26 S. Ct. 127, 50 L. Ed. 274, it was said: 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers * * * for the general good of the public, though contracts previously entered into by individuals may thereby be affected.'

"In Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 S. Ct. 529, 52 L. Ed. 828, it was said: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.'"

Appellants' argument that the Right-to-Work Amendment is invalid under the contract clause is based on their attempt to apply, out of context, excerpts from the opinions in two cases dealing with legislation which had to be justified by the existence of an emergency. In *Home Building and Loan Company* v. *Blaisdell*, supra the depression gave rise to the emergency which justified the mortgage foreclosure moratorium. In *Worthen Co.* v. *Thomas*, 292 U. S. 426, 78 L. Ed. 1344 (1934), it was held that a statute placing insurance proceeds beyond the reach of the beneficiary's existing creditors, which act contained no limitations as to time, amount, circumstances or need, cannot be justified as an emergency measure.

The opinions in both of those cases made it clear that emergency legislation was only one type of legislation

which could be sustained in spite of the fact that it impaired existing contracts. In the Worthen opinion the court, referring to the Blaisdell case, said (292 U. S. at 433, 78 L. Ed at 1347):

> "We held that this reserved protective power extended not only to legislation to safeguard the public health, public safety, and public morals, and to prevent injurious practices in business subject to legislative regulation, despite interference with existing contracts,—an exercise of the State's necessary authority which has had frequent illustration—but also to those extraordinary conditions in which a public disaster calls for temporary relief."

The Right-to-Work Amendment does not come under the "but also," but does come under the "not only." It is not temporary relief for a public disaster. It is legislation to "safeguard the public health, public safety, and public morals, and to prevent injurious practices in business subject to legislative regulation." It is permanent legislation designed to eliminate what would otherwise be a permanent evil. It is a case like those listed in the Blaisdell opinion in 290 U. S. at page 436, 78 L. Ed. at page 428, which list includes cases on abolition of lotteries and prohibition of sale of liquor. We close the discussion of this point with a quotation from the Blaisdell case which is appropriate to this case (290 U. S. at page 438, 78 L. Ed. at page 429):

> "Where the protective power of the State is exercised in a manner otherwise appropriate in the regulation of a business it is no objection that the performance of existing contracts may be frustrated by the prohibition of injurious practices."

D. Deprivation of Liberty Without Due Process—Prohibition vs. Regulation.

In the first assignment of error (R81) the appellants assert that the Right-to-Work Amendment, by reason of its absolute and unconditional proscription against entering into compulsory union membership agreements, is arbitrary, unreasonable, excessive and without rational basis, and deprives the union appellants of liberty protected under the Fourteenth Amendment. In sub-paragraph 35 of the petition (R18) the point of deprivation of liberty of contract without due process was raised in more general terms, but now appellants seem to rely almost entirely on the proposition that although regulation is permissible, the Right-to-Work Amendment is not regulation but is prohibition, and that that is not permissible. The distinction appellants' counsel attempt to make between regulation and prohibition is wholly inapplicable to the present case. There is no rule preventing prohibition of occupations or businesses. The rule is stated in 11 Am. Jur., Constitutional Law, Section 291, as follows:

> "Sec. 291. Generally.—The general rule is well settled that whenever it is necessary for the preservation of the public health, safety, morals, or peace or for the promotion of the general welfare of the community, the legislature may prohibit absolutely the carrying on of any particular business, calling, trade, or enterprise. A calling may not be immoral in itself, and yet the tendency of what is generally, ordinarily, or often done in pursuing that calling may be towards that which is admittedly immoral or pernicious. If, in the consideration of the circumstances that attend or which may ordinarily attend the pursuit of a particular calling, the state

thinks that certain admitted evils cannot be successfully reached unless that calling is actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matters, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear unmistakable infringement of rights secured by the fundamental law."

The purported rule plaintiffs' attorneys are attempting to draw up is merely an application of the general rule that the guaranty of due process demands only that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained.

In the cases cited by appellants in their brief, pages 105 to 108, it was held that it was unreasonable, arbitrary or capricious to prohibit useful and beneficial businesses such as employment agencies (*Adams* v. *Tanner*), manufacturing comforters from shoddy (*Weaver* v. *Palmer Bros. Co.*), the manufacture of mattresses, etc., from second-hand material (*People* v. *Weiner*), the undertaking business (*People* v. *Ringe*), the banking business by individuals (*Marymont* v. *Nevada State Banking Board*), the vocation of dry cleaning (*North Carolina* v. *Harris*), and auction sales (*Webber* v. *City of Scottsbluff*). In each of the cited cases the usefulness, lawfulness and beneficialness of the business prohibited is emphasized, and the fact that the thing prohibited was a business or vocation was emphasized. The closed shop is not a beneficial business or vocation. It is not a business or vocation at all. It is merely one of the incidents of present-day union activity.

All reasonable regulation involves some prohibition.

The regulations of the employer-employee relationship upheld by this court as listed in the quotation from *West Coast Oil Company* v. *Parrish*, at page 13 of this brief, all involved some prohibitions—prohibition of employment in excess of eight hours a day in underground mines and smelters, prohibition of payment of wages in store orders or other evidences of indebtedness not redeemable in cash, prohibition of payment of seamen's wages in advance, prohibition of contracts to pay miners employed at quantity rates upon the basis of screened coal instead of the weight of coal as originally produced at the mine, prohibition of contracts limiting liability for injuries to employees, and prohibition of a work day in excess of a certain number of hours.

A business is regulated by prohibiting what might otherwise be certain of its incidents or activities. Labor unions are regulated by the Right-to-Work Amendment, which prohibits closed shop contracts. All businesses in the State of Nebraska are regulated by the Right-to-Work Amendment to the extent that it prohibits employers from discriminating in hiring and firing on account of membership or non-membership in unions.

To summarize, certain types of businesses can be prohibited, such as the liquor business. Prohibition in such cases is considered reasonable. Prohibition of certain other types of business characterized by the courts as useful and beneficial businesses is considered unreasonable and a lesser degree of regulation is permitted. But any regulation involves prohibition of some incidents of the business, although not of the business itself. The Right-to-Work Amendment is a reasonable regulation of

labor relations, labor unions and employers, which regulates, as all regulations do, by prohibiting one of the noxious practices sometimes incident to the subject of regulation.

We think we have completely answered appellants' argument on this point. But we will go further and consider the direction in which regulations of the type appellants' counsel appear to ask for would lead. No regulation short of that contained in the Right-to-Work Amendment could completely attain the primary object of the Right-to-Work Amendment—the protection of the individual's right to work from any attempt to deprive him of it either because he is or is not a member of a labor union. The restrictions of the Labor-Management Relations Act come as close as a less complete proscription can, but it does not protect the man whose religious convictions prevent his becoming a member of or contributing funds to a union. Nor does it preserve to the individual unionist his final remedy against incompetent or tyrannical union leadership—the right to withdraw his financial support from the union.

At page 104 of their brief appellants suggest other forms of regulation of compulsory union membership contracts. No one of them nor a combination of all of them would accomplish all of the purposes of the Right-to-Work Amendment.

Of course, counsel for the appellants have suggested regulations other than the Right-to-Work Amendment with tongue in cheek, for when other types of regulation are suggested, they are as vehement in denouncing them and as vigorous in fighting them as they are in

opposing the Right-to-Work Amendment. They have opposed the regulation of the Labor-Management Relations Act no less than that of the Right-to-Work Amendment. As was well said in the dissenting opinion in *Wallace Corporation* v. *National Labor Relations Board*, 323 U. S. 248, 65 S. Ct. 238, 89 L. Ed. 216:

> "We suppose that there is no right which organized labor of every shade of opinion in other matters would unite more strongly in demanding than the right of each union to control its own admissions to membership. Each union has insisted on its freedom to fix its own qualifications of applicants, to determine the vote by which individual admissions will be granted, to prescribe the initiation or admission fees, to fix the dues, to prescribe the duties to which members must be faithful and to decide when and why they may be expelled or disciplined."

The opposition of the A. F. of L. to regulations such as those they suggest on page 104 of their brief, has met with some success in the courts. In *International Brotherhood of Teamsters (A. F. of L.)* v. *Riley*, — N. H. —, 59 Atl. (2d) 476 (June 1, 1948), they obtained a decision of the Supreme Court of New Hampshire that although the Taft-Hartley Act permitted prohibition of compulsory union membership contracts, nevertheless, any state law which attempted to regulate them to a less extent, would be in conflict with the federal law and therefore void.

The constant repetition in appellants' brief of the argument that unions are like public utilities, would logically lead to the conclusion that they should be subject to comprehensive regulation as public utilities are. Their insistence that they should have a monopoly of the

supply of labor would logically call for a governmental wage fixing commission just as the lack of competition in furnishing the service rendered by utilities calls for governmental supervision of their rates. The claim of the unions to be industrial governments, entitled to establish their own rules for the government of industry, logically would lead to their absorption by political government which would then control the determination of wage rates as well as all other matters with which unions may be concerned. In some countries a logical culmination of these arguments has come to pass. But the philosophy of those countries is foreign to our American ideals of freedom.

The Right-to-Work Amendment prevents the unions from having the monopolies which they avow is their ultimate goal, and tends to render unnecessary detailed regulations. The Right-to-Work Amendment thus leaves the unions as the masters of their own internal affairs and leaves them substantially free from state control. The choice of the voters of Nebraska was in favor of freedom—freedom for the individual and in the long run, freedom for the unions.

What we have been saying is not by way of debating which of two or more types of regulation is preferable. This court is not the arbiter for such a debate. We have mentioned these matters merely because we feel that they tend to emphasize that it cannot be said that the decision of the people of Nebraska in adopting the Right-to-Work Amendment is without rational basis.

CONCLUSION.

We stated in the outset of this brief that except for the fact that the court had accepted jurisdiction of the case of *Whitaker, et al.* v. *North Carolina*, we would have filed a statement against jurisdiction on the ground that the contentions of appellants are so unsubstantial that they do not merit consideration by this court. After reading this brief, we believe the court will understand why we were prepared to make that assertion. We submit that it clearly appears that the Right-to-Work Amendment is legislation the object of which is to promote the general welfare; that the means selected have a real and substantial relation to the object sought to be attained; that it is not unreasonable, arbitrary or capricious. Furthermore, we submit that even a judge who may disagree as to the wisdom of the legislation, will recognize that the legislation must be upheld under the rule often repeated by this court that "with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal." Certainly every member of this court must agree that it is not possible to say that this legislative decision of the people of Nebraska (as well as that of many other states, and of the United States Congress in the Railway Labor Act, the Bankruptcy Act, and the Labor-Management Relations Act) is without rational basis. The case should be affirmed.

Respectfully submitted,

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